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Supreme Court of the United States

OCTOBER TERM, 1956

No. 260

JOSEPH CURCIO, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 12, 1956
CERTIORARI GRANTED OCTOBER 8, 1956

SUPREME COURT OF THE UNITED STATES

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Docket Entries

(A)

CRIMINAL DOCKET — CRIM. NO. C 150–62

THE UNITED STATES

vs.

JOSEPH CURCIO

Violation—Contempt of Court.

Refusal to answer questions before March 29, 1956 Grand Jury.

DATE	PROCEEDINGS
4–19–56	Hearing begun 4-17-56 and concluded 4-19-56. The Court adjudges the witness Curcio in contempt.—Noonan, J.
4–19–56	Filed Judgment—Six Months at a place of confinement to be designated by the Atty general, unless he purges himself of contempt sooner. —Noonan, J.
	Defendant to surrender 4-20-56. Released on own recognizance.—Noonan, J.
4–19–56	Issued commitment and copies.
4–20–56	Filed notice of appeal.
4–23–56	Filed notice of appearance by Arnold Cohen, Atty. 2 Lafayette St. NYC.

Docket Entries

DATE	PROCEEDINGS
(B)	
5- 8-56	Filed certified copy of Order of United States Circuit Court of Appeals releasing defendant on bail in the sum of $5000. pending appeal. A. Daniel Fusaro, Clerk
5 -9-56	Filed Transcript of Record of Proceedings dated April 17, April 19, 1956.
5-10-56	Filed order to release and file a copy of the minutes of the testimony of Joseph Curcio before the Grand Jury on April 10, 12 and 17, 1956. —Noonan, J.
5-10-56	Filed Grand Jury Minutes (copy) dated 4-10-56, 4-12-56 and 4-17-56.

Transcript of Proceedings

(1) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Before:

HON. GREGORY F. NOONAN,

District Judge.

New York, April 17, 1956.

Appearances:

PAUL W. WILLIAMS, ESQ.,
United States Attorney, for the Government;

By ARTHUR H. CHRISTY, ESQ.,
HERBERT M. WACHTELL, ESQ., and
FIORAVANTE G. PERROTTA,
Assistant United States Attorneys.

ARNOLD COHEN, ESQ.,
Attorney for Witness.

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(2) Mr. Christy: The Grand Jury is down here, your Honor; with a request to the Court to direct a witness before the Grand Jury to answer certain questions. The witness's name is Joseph Curcio.

The Government will call the Grand Jury stenographer who took the testimony, Mr. Herman Rosenfield.

HERMAN ROSENFIELD, having been first duly sworn, testified as follows:

Direct Examination by Mr. Christy:

Q. Mr. Rosenfield, are you a Grand Jury stenographer? A. Yes, sir.

Q. Have you this afternoon taken the testimony of a witness named Joseph Curcio before the Grand Jury? A. Yes, sir.

Q. Mr. Rosenfield, do you have with you the stenotype tape that you took on the machine of that testimony? A. I do.

Mr. Christy: May I have it?

The Witness: Yes, sir (handing).

Mr. Christy: May we mark this as Government's Exhibit 1 for identification.

(3) (Marked Government's Exhibit 1 for identification.)

Q. I show you Government's Exhibit 1 for identification and ask you if that is the stenotype tape of a proceeding that you took before the Grand Jury. A. It is.

Q. Mr. Rosenfield, will you read to the Court the testimony that you have taken in the Grand Jury room.

Mr. Cohen: May it please the Court, I have no objection to this line of questioning, but will the witness be furnished with a copy once the minutes are transcribed of the questions which are the subject in issue at the present time?

Mr. Christy: At this point I do not think the Government is required to turn over to the witness a transcript of his testimony. This is merely a

request by the Grand Jury for a direction to the witness to answer certain questions.

Mr. Cohen: My request holds.

The Court: I beg your pardon?

Mr. Cohen: I still urge my request when these minutes are—

The Court: I do not think he is entitled (4) to any copy of the minutes at this point.

Mr. Christy: At this point. Should this go into a contempt proceeding, at that time of course the witness would be entitled to a transcript.

The Court: You are Mr. Curcio's attorney, I take it.

Mr. Cohen: Yes, sir, Arnold Cohen.

The Court: Have you noted your name on the record, Mr. Cohen?

Mr. Cohen: Yes. I repeat the appearance.

By Mr. Christy:

Q. Mr. Rosenfield, would you read the questions and answers, please. A. The witness was first duly sworn by the Foreman. (Reading)

By Mr. Wachtell:

Q. Mr. Curcio, you appeared before this Grand Jury on Thursday, is that correct, April 10th? A. Yes, sir.

Q. Is your lawyer with you today? A. Yes, sir.

Q. What is his name? A. Mr. Arnold Cohen.

Q. I am going to ask you some questions, including (5) some that were put to you on Thursday which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records?

The Witness: I would like to make a statement if I may at this time.

Mr. Wachtell: Mr. Curcio, will you please answer the question that was put to you.

The Witness: May I make this statement?

Mr. Christy: No, you cannot make any statement here in the Grand Jury.

The Witness: No statement?

Mr. Christy: No statement. You will be required to answer the question. Do you wish the question repeated?

The Witness: May I, please?

Mr. Wachtell: Would the reporter read back the question which is open.

(Whereupon the reporter read the question.)

The Witness: May I be refreshed as to what my answer was on Thursday?

Mr. Wachtell: Yes. On Thursday you first refused to answer that question on the grounds that (6), you felt it might tend to incriminate you. Subsequently, you said that you had not been in custody of those books and records on Monday, a week ago yesterday.

The Witness: I had refused to answer the question on Thursday and I refuse to answer it now.

The Foreman: You are directed to answer the question.

The Witness: I maintain my privilege.

By Mr. Wachtell:

Q. Mr. Curcio, have you ever had possession of the books and records of this local?

The Witness: I refuse to answer that question.

The Foreman: You are directed to answer it, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Did you have custody and control of these records last Thursday?

The Witness: I refuse to answer that question.

The Foreman: You are directed to answer, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Do you have possession of those records (7) or any of them today?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Do you have custody and control of any of those records today?

The Witness: I refuse to answer.

The Foreman: You are directed to answer, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Where are any of those records today, if you know?

The Witness: I refuse to answer.

The Foreman: You are directed to answer, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Who has any of those records today, if you know?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Where were any of these records or all of (8) these records a week ago Thursday?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Where were any or all of these records a week ago Saturday?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Where were any or all of these records a week ago yesterday, Monday?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Where were any or all of these records this past Thursday?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Where are any or all of these records, today?

(9) The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Who, if you know, had any or all of these records a week ago Saturday?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Who had any or all of these records a week ago yesterday?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Who has any or all of these records today?

The Witness: I refuse to answer.

The Foreman: You are directed to answer that question, Mr. Curcio.

The Witness: I maintain my privilege.

Mr. Wachtell: Mr. Foreman, would you excuse the witness and direct him to remain in the waiting room.

(The Foreman so directed the witness and the witness left the room.)

(10) Mr. Christy: No further questions, Mr. Rosenfield.

Mr. Cohen: No questions.

Mr. Christy: Thank you, Mr. Rosenfield.

(Witness excused.)

Mr. Christy: May I give you just a bit of the background, your Honor?

Mr. Curcio was subpoenaed for April 10th, served with a duces tecum subpoena for that day. He did appear on that day, at which time he requested the Grand Jury to give him an opportunity to consult with counsel before he answered any questions.

At that time the Grand Jury directed him to return on Thursday, April 12th, at which time he would testify.

He appeared on that day and he answered certain questions, but he claimed his privilege on the bulk of the questions.

He was directed by the Grand Jury on April 12th to return today. He has appeared and has refused to answer certain questions.

I might say to your Honor that on Thursday, April 12th, when he appeared, he admitted that he was secretary-treasurer of Local 269, and he admitted (11) that he had been served with a subpoena duces tecum. He at that time denied possession of the books on certain days, and Mr. Wachtell will be able to give your Honor the rundown on that, if your Honor wishes it.

The Court: How do you say, Mr. Cohen, that his answering of these questions might incriminate him?

Mr. Cohen: The witness, I have been informed, did at one time answer questions that he did not have possession of the books and records. That

certainly takes care of the subpoena duces tecum which was served upon him. Any other question relating to "Did you ever have possession" or "Do you know who has possession" I feel that his privilege goes to these questions and answers, because the nature of the investigation before the Grand Jury, if we are to try to get our information from the press, is to investigate racketeering in trucking and food local unions.

In addition to that, we have here a civil action which is now being litigated, I think, on the 15th floor of this court.

Insofar as the nature or purpose of any (12) investigation by the Grand Jury relating to those questions, the defendant in many ways could be tied in, not being able to find out or determine or not being permitted to find out or determine the nature of the investigation in question, and he has the right, if in his mind he believes that the answer might incriminate him, to assert the Fifth Amendment to protect himself. I am telling the Court in good conscience that he is asserting the Fifth Amendment because in his mind there is some doubt as to whether or not any of these answers might incriminate him by conspiracy, by association, or by any other subsequent action that the United States Attorney's office might start.

The Court: I do not think it is possible, of course, under the circumstances, for anybody to become a metaphysician and determine what is in somebody's mind. I do not think we have gone so far in modifying the ancient rules of Anglo-Saxon jurisprudence to permit a reluctant witness, like the reluctant dragon, to hamstring a grand jury investigation by a mere claim that he has in his own mind that he

thinks to answer the question will tend to degrade or incriminate upon.

It would seem to me to be incumbent upon (13) the person who asserts the claim of privilege to justify that claim at the bar of reason.

Assuming, arguendo, that it is asserted in good faith, I do not think that is sufficient to justify the rule, or to satisfy, rather, the rule that now exists in this circuit.

Mr. Cohen: Judge, we are not clear as to whether or not admission of possession of any of these records might not involve him in a criminal prosecution.

The Court: He is admittedly, is he not, the former secretary or former secretary and treasurer?

Mr. Cohen: He admitted to that. He stated that.

The Court: Then, in the normal course, and presuming regularity and not irregularity, the secretary-treasurer of any organization, incorporated or unincorporated, would either have possession of or at least access to the possession—

Mr. Cohen: He stated—

The Court: —of the books and records of the outfit which he represents.

Mr. Cohen: He stated that he did not now have possession of those records. I understand that question and answer was made.

(14) The Court: That is a satisfactory answer as far as it goes.

Mr. Cohen: Concerning when and where the records were last seen or whether there are any other records in existence, I think that his privilege is properly asserted.

The Court: Is that all you have to say?

Mr. Cohen: At this time those are the questions,

and I think he has properly asserted his privilege.

The Court: I do not think you have made a showing sufficient to justify my holding that the claim of privilege has been asserted in good faith.

Mr. Cohen: May I be heard for just one moment, sir?

The Court: Surely.

Mr. Cohen: I believe that the burden is upon the United States Attorney to prove that there is a wilful and criminal contempt in refusing to answer.

The Court: In the Trock case decided this month in this circuit, you will see that the rules are set down. United States v. Trock.

Mr. Christy: I might point out to your Honor that this is not a contempt proceeding at this point but is merely a request for direction.

(15) The Court: This is a request for instructions, but—

Mr. Cohen: May I make this one further statement, Judge?

The Court: I do not think, frankly, and it is not just because, Mr. Cohen, that I used to be in the U. S. Attorney's office, but I do not think anybody should be permitted to make a mockery of a grand jury investigation by glibly asserting his privilege of the Fifth Amendment. Unfortunately in the past few years the Fifth Amendment has become something which most Americans look askance at, instead of feeling that it is one of the greatest safeguards that we have in the Bill of Rights.

Mr. Cohen: The Supreme Court has recently stated that.

May I, as an officer of this court, make a further statement?

The Court: Surely.

Mr. Cohen: I believe that to some extent the investigation, as far as I have been informed by my client, by the jury, is going into the internal affairs of a labor organization. I believe if there is any suspicion, proof or reason to believe that any (16) labor organization or any official of any labor organization has committed any crime, they should be vigorously prosecuted. But I also feel that the United States Attorney's office should not be used to go into the internal affairs of a labor organization and to ask questions that are not material or relevant to the purposes of convenience of this noble and honorable Grand Jury for the purpose of possibly establishing something which is the subject of litigation in another part of this building.

The Court: I am certain that, first of all, the United States Attorney, Mr. Williams, who is in the courtroom, he does not need any defense from me for his actions. That goes without saying. But I am certain that just as the proceedings before this Grand Jury links up with what we have heard in court, are secret, as far as you are concerned, and as far even as the Court is concerned, and that secrecy prevails with even greater force as far as the parties to the civil litigation are concerned, which you say is going on on the 15th floor. I am certain that this Grand Jury investigation is not being conducted in aid of any party to that particular civil litigation upstairs.

(17) Mr. Cohen: Another line of questioning, independent of the production of the books and records, seems to indicate support to my position.

The Court: I am going to tell the witness—is this the witness, Mr. Curcio?

Colloquy

Mr. Curcio: Yes.

The Court: I am going to tell you, Mr. Curcio, that I do not believe that with respect to the questions asked, as read by the stenographer here this afternoon before me, that the claim of privilege is properly exercised by you. I direct you to return to the Grand Jury room and answer the questions asked. If you don't, then it will be up to the Foreman and the members of the Grand Jury to decide whether you will be brought down before the Court and the Court asked for a contempt citation.

Mr. Cohen: May I ask the Court whether the direction is as to all of the questions? Certainly there were some of the questions there, and I contend all of them, where the privilege was properly asserted: Would you give some specific direction?

The Court: All of the ones that I heard the stenographer read seem to me to be repetitious in many respects, but certainly the ones that I heard have (18) been properly asked and should be answered.

Mr. Cohen: Could the direction be limited to a certain few questions that Mr. Christy might advise the Court of that he wants answers to?

As it is, I think it is—

The Court: Certainly they are all the same, relatively speaking.

Mr. Christy: That is right.

The Court: Except as to different dates, whether it was last Thursday, today, or last Tuesday or today, last week or today.

Mr. Cohen: Can we have the witness directed as to three or four questions that you might want a direction on, Mr. Christy?

Mr. Christy: I would like to have the witness directed to answer all questions.

Colloquy

The Court: I will direct the witness to answer as many of those questions that were asked today as the United States attorney sees fit to re-ask. He may decide not to ask all of them again.

Do you understand that, Mr. Curcio?

Mr. Curcio: Yes, sir.

Mr. Wachtell: I would like to state for the record that there are other questions not pertaining (19) to the books or records which it has been indicated to the Court that the witness did not answer on a prior appearance. The Government might feel at some future date that those questions are proper.

The Court: You, of course, have the right to reserve any rights which you have.

Mr. Wachtell: And in view of your Honor's ruling we believe that it is not necessary to raise this issue. I would just like to state for the record that there are substantial grounds here, in view of some of the answers that have not been given by the witness on his last appearance before the Grand Jury, on which the asserted claim of privilege urged by Mr. Cohen would have been waived. I state that for the record.

Mr. Cohen: May I have time to consult with my client before he returns to the Grand Jury room?

The Court: Certainly.

Mr. Christy: You may consult with him.

The Clerk: Retire to Room 514.

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(20) New York, April 19, 1956

Present:

Mr. Christy,
Mr. Wachtell,
Mr. Perrotta,
Mr. Cohen.

The Court: Yes, Mr. Christy?

Mr. Christy: Your Honor will recall that this matter was brought to your attention last Tuesday. At this point the Grand Jury again requests the aid of the Court in compelling a witness, Joseph Curcio, to answer certain questions.

Before I call the Grand Jury stenographer, I would like to make a statement with regard to certain things that have happened.

As I advised your Honor Tuesday, the witness first appeared before the Grand Jury on Tuesday, April 10, 1956. He had been served with both a personal subpoena and a subpoena duces tecum for the production of books and records of Local 269.

At his appearance on April 10th he refused to answer any questions without having an opportunity (21) to consult with his attorney. At that time the Grand Jury gave him an opportunity to talk with his attorney and requested him to return to the Grand Jury on Thursday, April 12th.

At his appearance on April 10, 1956, he did not bring with him any books or records as called for in the subpoena duces tecum.

In accordance with the direction of the Grand Jury given on April 10, 1956, Curcio reappeared

before the Grand Jury on Thursday, April 12th. On Thursday, April 12th, he again appeared without any records, and at this session a number of questions were put to the witness. He refused to answer a great many of the questions, particularly the questions relating to the existence or the whereabouts of the books and records.

During that session the defendant Curcio admitted that he was the secretary-treasurer of Local 269 of the International Brotherhood of Teamsters. He admitted that on Monday, April 9th, he had been served with a subpoena duces tecum calling for the records of that local, and at that session of the Grand Jury he admitted that such records did exist.

He also said that the records were not in (22) his possession on Thursday; that they had not been on the previous Monday. He said that he did not have custody or control on Monday, custody and control of the books, and he refused to answer any questions as to whether he had had custody or control at any other time. He refused to say where the records were or who had them. At that time the Grand Jury directed him to return again on Tuesday, April 17th.

He returned to the Grand Jury on April 17th, and a series of questions were put concerning the location of the books and records of Local 269. He refused to answer these questions and was directed by the Foreman of the Grand Jury to answer these questions. At that time he was brought down before your Honor, the questions were read off, and your Honor directed the witness to return to the Grand Jury and answer the questions which he had theretofore refused to answer.

In accordance with your Honor's direction the wit-

ness returned to the Grand Jury and the questions which had been put to him previously, and which were read to your Honor in court, were again put to the witness, and again Curcio claimed his privilege as to each and every question which had been put to him (23) previously. At this time I would call Herman Rosenfield, the Grand Jury stenographer.

Mr. Cohen: May I be advised of the purpose of this hearing or this proceeding?

Mr. Christy: This is a contempt proceeding, your Honor.

The Court: In other words, Curcio is being cited by the Grand Jury foreman to the Court for contempt for refusing to follow the direction of the Court issued to the witness Curcio on Tuesday, April 17th?

Mr. Christy: Did you ask if he has been voted in contempt?

The Court: I say he has been cited by the foreman and the Grand Jury to the Court now?

Mr. Christy: Yes.

The Court: For contempt.

Mr. Christy: In reply, the Grand Jury has not voted a contempt citation at this time, nor is it a contempt proceeding for what has actually occurred up to date.

I request at this time that the questions the witness has refused to answer be put to him again by the Court with a request to the witness asking if he intends to answer the questions, at which time a (24) contempt will be committed in the presence of the Court.

The Court: Well, if it is committed in the Grand Jury room it is still in the presence of the Court, as far as that goes. But I think that under the new

rules you have to file a written specification, don't you, Mr. Wachtell?

Mr. Christy: I do not believe that is so, your Honor.

(Discussion between Mr. Christy, Mr. Wachtell and Mr. Perrotta off the record.)

Mr. Wachtell: I believe that under Rule 42, that while a grand jury in the presence of the court, under the statute, the witness is guilty of contempt, if repeated in the presence of the court, under subsection (a), Rule 42, dealing with the summary disposition of procedure for contempt.

Therefore, the Government is now asking that in accordance with the procedure followed in the recent Trock case, with which I believe your Honor is familiar—

The Court: Yes.

Mr. Wachtell: —that the questions be put to the witness now in the physical presence of the Court, and if he continues to refuse he may be (25) punished summarily under Rule 42(a) of the Federal Rules of Criminal Procedure.

Mr. Cohen: May I be heard?

The Court: Yes.

Mr. Cohen: If this is a contempt proceeding, I ask for a reasonable time to prepare a defense and ask that the defendant be served with a list of specifications as to the essential facts which the Government alleges is relevant to a contempt proceeding or which constitutes contempt.

I also asked to be served with a copy of any testimony before the Grand Jury as to the questions which he has been directed to answer, the questions which the Government claims constitute the con-

tempt, before undertaking any hearing, and in the interest of justice that the witness should be given a reasonable opportunity to prepare a defense.

The Court: As I gather it, this proceeding now before me is not a contempt proceeding. When I said it was before, I was apparently in error. It is not a contempt proceeding.

Mr. Cohen: I did not understand Mr. Christy, then.

The Court: The witness is being brought (26) before the Court for the purpose of having him answer certain questions by the Court in the presence of the Grand Jury, and if he refuses to answer those questions, then I would assume that it would be up to the Court to determine whether he was guilty of contempt of court.

Mr. Cohen: I ask the Court to follow the ruling in the Carlson case, 209 Fed. 2d 209, where the Circuit Court there held that contempt proceedings should be instituted under Rule 42(b).

The Court: In the Trock case it was done just the way Mr. Wachtell suggests.

Mr. Cohen: I am relying upon the appellate court of that jurisdiction where—

The Court: That was affirmed by the Circuit Court in this circuit.

Mr. Cohen: I do not agree with that.

The Court: That is the court that binds me. That is the one which tells me what to do.

Mr. Christy: That was a decision decided on April 9, 1956.

Mr. Cohen: Will your Honor pass upon my request?

The Court: No. I will let the Government proceed at this time and see what develops.

(27) HERMAN ROSENFIELD, called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Christy:

Q. Mr. Rosenfield, are you a Grand Jury stenographer employed in the Southern District of New York at the United States Courthouse? A. Yes, sir.

Q. Did you on April 17th take the testimony on two occasions of the witness Joseph Curcio? A. I did.

Q. How do you take your notes, sir? A. Stenograph.

Q. Do you have the stenograph tape on the second occasion on which Mr. Curcio appeared? A. I do.

Q. May I have it? A. Yes, sir (handing).

Mr. Christy: Mark this Government's Exhibit 2.

(Marked Government's Exhibit 2 for identification.)

Q. I show you Government's Exhibit 2 for identification and ask you if that is the stenographic tape that you took the testimony of Joseph Curcio on (28) his second appearance on April 17th. A. It is.

Q. And from that stenographic tape did you prepare a transcript of the testimony on the second occasion? A. I did, and from the previous notes which were taken.

Q. Do you have a transcript of the testimony on the second occasion? A. Yes, sir (handing).

Mr. Christy: Will you mark this for identification.

(Marked Government's Exhibit 3 for identification.)

Q. Mr. Rosenfield, I show you Government's Exhibit 3 for identification and ask you if that is a transcript of the testimony of Joseph Curcio on the second appearance on April 17, 1956. A. It is.

Q. Is it a true and accurate transcript? A. Yes.

The Court: The second appearance on that day?

Q. The second appearance on April 17, 1956? A. That's correct.

(29) Mr. Christy: I will offer Government's Exhibit 3 for identification in evidence, your Honor.

The Court: Have you a copy for Mr. Cohen?

Mr. Christy: Yes. We have a copy that we will provide Mr. Cohen with (handing to Mr. Cohen).

May the record show that a copy of Government's Exhibit 3 was handed to the defense attorney.

Mr. Cohen: May I examine him on the voir dire?

Cross Examination by Mr. Cohen:

Q. Have you examined Government's Exhibit 2 for identification? A. May I see it?

Mr. Christy: You have it up there, Mr. Rosenfield.

The Witness: Yes, I have.

Q. When was the last time you examined it? A. Yesterday evening before this appearance in court.

Q. When did you prepare Government's Exhibit 3? A. That is the transcript?

Q. The transcript. A. Yesterday evening.

(30) Q. Did you read the transcript after it was pre-

Q. When did you do that? A. I read that this morning.

Q. Did you read it alone? A. Alone.

Q. So that two steps were taken: You say that you examined the original notes when you took them, is that right? A. That's correct.

Q. And thereafter you examined the transcript, you prepared a transcript; is that right, on those notes? A. That's right.

Q. You then said that you read the transcript? A. That's correct.

Q. Is that all that you did in connection with Government's Exhibit 2 and Government's Exhibit 3 for identification? A. That's correct.

Mr. Cohen: I respectfully submit that there is no proof before the Court that this is an exact or proper transcription, since it was never compared (31) with the original notes, from the testimony of the witness.

The Court: When you said you looked at it, did you check it against the stenographic notes, the stenotype notes?

The Witness: I did not check it word for word against it after it was transcribed, but I read through it to take care of any typographical errors that may have occurred.

Mr. Cohen: I press my objection.

The Court: He is technically right, I suppose.

Mr. Christy: If there is any question, I can have Mr. Rosenfield read from his notes right now.

The Court: All right, Mr. Cohen, if you want to waste time.

Mr. Cohen: I just want the record to be completely clear that he says this is correct. If he reads through it and there is any doubt, I am not here

to waste the time of the Court, but I have to protect the legal privileges of my client. That is all I am doing.

The Court: Do you waive objection to that exhibit, or withdraw it, rather?

(32) Mr. Cohen: I will withdraw it if Mr. Rosenfield in any way can say that some check was made as against the notes. If he does it now for a few minutes. I will take a spot check.

The Court: Spot check it against your notes.

Mr. Cohen: I do not know whether they are both the same thing at this moment. The Grand Jury does not know it either.

The Court: We will take five minutes and let him do that.

(A short recess.)

By Mr. Cohen:

Q. Did you spot check Exhibit 3? A. Yes, sir.

Q. What is your finding? A. My finding is that it is accurate.

Mr. Cohen: I withdraw my objection.

(Government's Exhibit 3 for identification received in evidence.)

Mr. Christy: Mark this for identification.

(Marked Government's Exhibit 4 for identification.)

Mr. Christy: At this time the Government (33) will offer Government's Exhibit 4 for identification.

which is the subpoena duces tecum which was served upon Mr. Curcio for the production of the books and records which he has so far refused to produce.

Mr. Cohen: No objection.

(Government's Exhibit 4 for identification received in evidence.)

Mr. Cohen: I call the Court's attention to this point. With reference to Exhibit 4, there was testimony recited by Mr. Christy, given by the witness during a session before the Grand Jury on April 12th. We have no transcript of that. I just want to direct the Court's attention to that. He did answer cerain questions relating to the subpoena duces tecum.

Mr. Christy: At this point, your Honor, the Government would request that the Court put to the witness Curcio those questions contained in Government's Exhibit 3 and ask him if he intends to answer those questions.

The Court: Will you take the stand, Mr. Curcio. I expect he had better be resworn because it is before me.

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(34) JOSEPH CURCIO, being first duly sworn, testified as follows:

The Court: Mr. Curcio, I expect to proceed to ask you certain questions, but before I do I want to ask your counsel, Mr. Cohen, if he has any instructions he wishes to give you.

Mr. Cohen: I was anticipating that. I would like to advise my client that if he in good faith reasserts

his privilege as to any question that he feels might incriminate him, even though the Court does ask the questions, he may do so.

The Court: All right. I will read the questions which appear on Exhibit 3, and I am just reading the questions, Mr. Cohen, so you can follow me.

Mr. Cohen: Yes, sir.

Examination by the Court (Reading):

"Q. I am going to ask you certain questions, including some that were put to you on Thursday, which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records?" A. I most respectfully, your Honor, refuse to (35) answer on the ground that it may tend to incriminate me.

Q. "Q. Mr. Curcio, have you ever had possession of the books and records of this local?" A. I most respectfully, your Honor, refuse to answer on the grounds that it may tend to incriminate me.

Q. "Q. Did you have custody and control of these records last Thursday?" That is a week ago today. A. I most respectfully, your Honor, refuse to answer on the grounds that it may tend to incriminate me.

Q. "Q. Do you have possession of those records or any of them today?" A. I most respectfully, your Honor, refuse to answer on the grounds it may tend to incriminate me.

Q. "Q. Do you have custody and control of any of those records today?" A. Most respectfully, your Honor, I refuse to answer on the grounds it may tend to incriminate me.

Q. "Q. Where are any of those records today, if you

know?'' A. I most respectfully, your Honor, refuse to (36) answer on the grounds it may tend to incriminate me.

Q. ''Q. Who has any of those records today, if you know?'' A. Most respectfully, your Honor, I refuse to answer on the grounds it may tend to incriminate me.

Q. ''Q. Where were any of these records or all of these records a week ago Thursday?'' That would be two weeks ago today. A. Most respectfully, your Honor, I refuse to answer on the grounds it may tend to incriminate me.

Q. ''Q. Where were any or all of these records a week ago Saturday?'' A. Most respectfully, your Honor, I refuse to answer on the grounds it may tend to incriminate me.

Q. ''Q. Where were any or all of these records a week ago last Monday?'' A. Most respectfully, your Honor, I refuse to answer on the grounds it may tend to incriminate me.

Q. ''Q. Where were any or all of these records yesterday?'' That question reads ''Thursday.'' I am changing it to ''yesterday.'' A. Most respectfully, your Honor, I refuse to answer on the grounds it may tend to incriminate me.

(37) Q. ''Q. Where are any or all of these records today?'' A. Most respectfully, your Honor, I refuse to answer on the grounds it may tend to incriminate me.

Q. ''Q. Who, if you know, had any or all of these records a week ago last Saturday?'' A. Most respectfully, your Honor, I refuse to answer on the grounds it may tend to incriminate me.

Q. ''Q. Who had any or all of these records a week ago yesterday?'' A. Most respectfully, your Honor, I refuse to answer on the grounds it may tend to incriminate me.

Q. ''Q. Who has any or all of these records today?'' A. Most respectfully, your Honor, I refuse to answer on the grounds it may tend to incriminate me.

The Court: Those are all of the questions that were asked.

Mr. Christy: Your Honor, may I make a statement for the record: That the questions which your Honor has read to the witness were those put to the witness on April 17th, 1956. So when your Honor used the word "today," you refer to that day.

The Court: That is correct. When I (38) referred to a week ago last Saturday I referred to—

Mr. Christy: Saturday preceding April 17th.

The Court: —the Saturday preceding April 14th.

Mr. Christy: April 17th, I believe.

The Court: April 14th.

Mr. Christy: I beg your pardon.

The Court: I refer to a week ago last Saturday.

Mr. Curcio, in the absence of some explanation or justification for your refusal to answer these questions—and I do not think there is any apparent reason that would justify the exercise by you of the claim of privilege under the Fifth Amendment—however, before I make any formal finding or impose any punishment, I want to give your attorney an opportunity.

I think under the rule of law laid down in the Trock case, Mr. Cohen, you have the burden of proving, to a point at least, that there is some justification for the claim of privilege, not that you have to explain in such detail so that the very effect of the privilege itself would be destroyed by virtue of the explanation, but I think the case is pretty clear and stands clearly for the proposition, that you (39) have to take some step forward beyond the mere refusal where, in the opinion of the Court, there is no proper basis for the exercise of the

privilege, where the questions do not show themselves, or show from the face of the context of the questions, that there is a possibility of self-incrimination of the witness.

Where were these books last week or two weeks ago; where were they last Saturday or a week ago last Saturday; where are they today; who has them today; did he ever have them; does he have them now? Those would certainly not appear on their face to be questions that would tend to incriminate him.

I have in mind if the question he was asked, Did he consult the other night or did he meet in the basement of some West Side tenement the other night and plan a murder, or something of that sort, where it appears on the face of the question that he has justification for exercising the Fifth Amendment.

What do you say, Mr. Cohen?

Mr. Cohen: Well, absent the making of a statement as to what I think is valid to the claimed privilege, if we are proceeding in a contempt proceeding, I would ask reasonable time to prepare a defense, and whatever my claim might be, to have it supported by (40) witnesses or any other documents that I may feel are relevant or material to the defense of contempt in a contempt proceeding. I would also want reasonable time to prepare the defense, and also the specification might relate to the subpoena duces tecum. I have not been served with a transcript of the April 12th testimony before the Grand Jury.

I further feel that the United States Attorney's office should advise the witness and counsel as to what are the essential facts constituting any contempt of court.

Joseph Curcio—Defendant—By the Court

The Court: I think in a summary proceeding where the facts are of this fashion; the essential facts are rather self-evident that the witness was asked a question and he has refused to answer the question, I said that absent some explanation by you, showing a justification for the exercise of that Fifth Amendment, I am prepared on the face of the record, without any explanation, if you do not make any, to hold that the conduct of the defendant is such as to constitute a contempt of this court.

Mr. Cohen: Will your Honor set it down for a hearing and give me a chance to call some witnesses?

The Court: In a summary proceeding of this (41) fashion, I do not think it is necessary. This contempt has now been committed, not against the Grand Jury, but against the Court. He has just refused to answer these questions that I have told him to answer.

I will give you another chance, Mr. Curcio. I am going to tell you now that I am directing you now to answer these questions. If I were to put these questions to you again, would you still claim the privilege of the Fifth Amendment?

Mr. Cohen: May I be heard at this time?

The Court: I want him to answer that question first, Mr. Cohen, if I may.

The Witness: Yes, your Honor.

The Court: You would not answer them if I asked them again?

The Witness: Yes, your Honor.

Mr. Cohen: May I state to the Court that I believe this is still a proceeding before the Grand Jury. It is not a trial. It is not a hearing before the Court.

Joseph Curcio—Defendant—By the Court

The Court: The Grand Jury is an arm of the Court.

Mr. Cohen: It is an arm of the Court, but (42) it is still a proceeding, and it might be a contempt committed before the Court during the course of trial or proceeding or hearing. It is still a proceeding before the Grand Jury. It is a secret proceeding. The witness is not advised of the extent or purpose of the investigation.

The Court: Nothing secret about this. Any spectator who has wanted to come in has been allowed in.

Mr. Cohen: I am talking about the Grand Jury.

The Court: The press is here, I see; at least I assume they are members of the press. I think I recognize one. So there is no secrecy about this proceeding.

Mr. Cohen: Not in court.

The Court: As it would be if it were up on the fifth floor before the Grand Jury.

Mr. Cohen: I still claim that this is a proceeding before the Grand Jury. Again I ask the Court to follow the Carlson case, whatever the law may be, and I think there should be a hearing. He should be given an opportunity to prepare a defense and call witnesses, if we feel that they are necessary.

(43) But I do not want to evade answering your question, since you ask me as an officer of the court, why do I believe that he is exercising properly the claim of privilege.

I say that this investigation might lead to a conspiracy indictment; that the questions that are being asked might, in some way, be connected with or be part of or used for the conspiracy indictment. Having that in mind, in good faith, even though it

might be an erroneous assumption of privilege, it is not contempt because certainly with the avenue of investigation today, we have to examine the atmosphere that we are living in; not only the jurisdiction of the federal but also the jurisdiction of the state, and there is certainly sufficient ground to believe that conspiracy might lie from the line of questions that are being asked. If that is in the witness's mind, as I know it is in the witness's mind, I say that he is properly exercising his constitutional guarantee under the Fifth Amendment not to answer these questions on the ground that the answers might incriminate him.

The Court: I cannot conceive how the answering of the questions now before the Court—and that is all I am concerned with—could possibly (44) incriminate him in any conspiracy. Maybe Mr. Christy can resolve it.

Mr. Christy: Your Honor, I want to say as to the argument as to the availability of the privilege, the time for such argument occurs at the time the Court directs the witness to answer the questions, at the time we were down here on Tuesday, April 17th.

You have given the witness a direct order of the Court to answer them. I do not think that Mr. Cohen at this time can argue the availability of the privilege.

The Court: I think he can argue it.

Mr. Cohen: May I answer Mr. Christy's statement?

The Court: Yes.

Mr. Cohen: Then I certainly would be prepared somewhere else to discuss with your Honor why I believe answering these questions might be the sub-

ject matter of a conspiracy indictment, or might lead to a conspiracy indictment. As your Honor said—

The Court: I do not think there is a member of the Grand Jury panel here who could conscientiously or honestly say that they have the remotest idea as (45) to what kind, if any, indictment will be filed.

Mr. Cohen: That is just it.

The Court: Mr. Christy probably does not even know. He might have hopes.

Mr. Cohen: That is a protection against what might transpire. That is a real danger, a conspiracy indictment.

The Court: I think there has to be a going forward by the witness in this case, the witness and his counsel, such as would satisfy me that there is a real possibility of harm—

Mr. Cohen: Judge, I can go further.

The Court: —coming to the witness. Nobody wants that to happen.

Mr. Cohen: As you said so wisely, you do not want the witness in fact to waive his privilege by advising the United States Attorney or the Grand Jury of any facts that might lead to the statements made, as to just what further is in his mind as to a conspiracy. In that way he would be called upon to testify against himself.

The Court: He is probably afraid that he will wake up some morning with his head in a cement block at the bottom of the East River if he talks too (46) much, or at least he has to make some attempt to justify it, if he should talk later and say anything. He has got to make some showing in advance thereof that what he said was minimal and then only because the Court hit him over the head.

Mr. Cohen: I have a valid answer to that, but I do not want to speculate in any way.

The Court: I was only joking.

Mr. Cohen: I know that. As an attorney, I want to answer your Honor as to what I think is the proper defense here, and I fear that in that way it might be going beyond his privilege. But if your Honor wants me to explain it to you before you rule, may I have the privilege of doing so in the absence of the Grand Jury and in the absence of the United States attorneys? I won't hesitate to do it. I will tell your Honor exactly what is in my mind, and most likely in my client's mind. I would not hesitate to do that.

The Court: Mr. Cohen, I do not think in fairness to the Government or to the Grand Jury that I should have you tell me something in secret which they cannot know.

Mr. Cohen: I would tell that. Mr. Christy (47) could be present.

The Court: I think if you could tell it to Mr. Christy and to the Court, you could tell it to the Grand Jury. As a matter of fact, they are bound by an oath and I am not bound by one.

Mr. Cohen: I am bound by an oath, too, sir.

The Court: I know that.

I am going to adjudicate the witness in contempt of court and I am going to commit him to the custody of the marshal and the United States Attorney General until such time as he has purged himself of contempt.

Mr. Cohen: Would you in way fix bail at this time? You have the right.

The Court: I will fix bail, yes. At least I assume I have that right.

Mr. Cohen: I think you do, sir. There are serious questions involved.

The Court: Does he live with his wife or his family?

Mr. Cohen: He lives with his wife.

The Witness: I live with my wife and son.

The Court: Where is that, Mr. Curcio?

(48) The Witness: Flushing.

The Court: Do you have your own house?

The Witness: No, I live in an apartment.

The Court: Do you own a car?

The Witness: Yes, sir.

The Court: How long have you lived in that house?

The Witness: The house I am in now, it is only a matter of a month, but I live in the development over three years.

The Court: How long have you been married?

The Witness: Going on sixteen years.

The Court: Never been in any trouble? Do you have a record?

The Witness: Yes, your Honor.

Mr. Christy: May I say something, your Honor? As you have already adjudicated the witness in contempt, to admit him to bail you must find that there are substantial questions of law. It seems to me that under your Honor's ruling he is not therefore entitled to bail.

Mr. Cohen: I intend to exhaust all of my rights and remedies. This is not a frivolous attempt. I want to take this up with care.

(49) The Court: Mr. Christy, what I have in mind, I am following what I conceive to be the rule of law laid down by the Court of Appeals just recently in a 2-to-1 decision, April of this year,

April 6th. Judge Medina dissented. The two judges ruled that what I am doing here is apparently the right procedure to follow.

But there is a case that Mr. Cohen called my attention to, which would be binding on me if we were holding court in Boston, because the Court of Appeals for the First Circuit has said just what Mr. Cohen urged just before we took the recess, namely, that there must be written specifications and charges and opportunity for the defendant to put in an answer and for a hearing. But there cannot be any summary disposition of a contempt, whether it is committed in the presence of the court or in the presence of the grand jury, and for that purpose, as far as that goes, the grand jury room is considered as being a part of the court, on the theory under which we have always proceeded. There is a very able dissenting opinion by Judge Medina, but I do not think the Court would reverse itself. There is a question that has been resolved as far as the United States Supreme Court (50) is concerned.

The circuit that is binding on me has said that what you should do is what the United States Attorney's office has done and in the way that I have decided it. You are dealing here with somebody's freedom. No matter who they are, what you think they are, what they have been or may be, that is something that you cannot deal lightly with. There is nothing more important than a person's individual freedom.

Mr. Christy: Your Honor, you referred to the Carlson case a minute ago. I have that case here. We respectfully disagree with something you said

about it. If I may read and quote from that case, the Carlson case, 209 Fed. 2d 209, and on page 216 the Court says:

"If the witness then and there in the face of the court declines to do so, this is disobedience to the lawful order of the court under 18 USC 401-3. And since disobedience occurs in 'the actual presence' of the judge, it may be punished summarily under Rule 42(a)."

The Court: What did I say that was different than that?

(51) Mr. Christy: Your Honor indicated that it had to be done under specifications under the Carlson case.

The Court: No, I said if we were in the First Circuit. Don't they hold—

Mr. Christy: This is the case I am reading from.

The Court: Are you reading from the majority opinion?

Mr. Christy: I think so.

The Court: I am sure that the procedure that we followed here is certainly the correct one in this circuit, in any event.

Mr. Cohen: I am going to urge Judge Medina's decision—

The Court: I tell you, I will give you until 4.30 to get bail in the Court of Appeals. I will deny bail here. But I do want in the sentence that I imposed, I want to impose sentence of six months with the right on the witness to purge himself at any time by answering the questions. I forgot to say "six months," otherwise he might be there—

Mr. Cohen: I have nothing to go before the Court of Appeals on, no order.

(52) The Court: You can go up there.

Joseph Curcio—Defendant—By the Court

Mr. Wachtell: Your Honor, there has to be a written order under the rules, and a certification by the judge, in writing. The Government is preparing the draft. It will be ready soon.

Mr. Cohen: Won't your Honor admit him to bail? He has always appeared in this jurisdiction. He is subject to any subpoena. I can make this statement to the Court. You were given certain dates. On April 9th, when he was served, I was in Albany before the State Labor Relations Board. On April 10th I was in the Supreme Court, Nassau County, on an injunction case. As soon as I was notified, I asked the United States Attorney's office to put it over so I could consult with him because I knew nothing. It was only for the first time that he was brought before the Grand Jury. Even though I was in Nassau County, and it was on that date that it was adjourned to the 12th. He did return. He has been available and present. Certainly that is the purpose of bail in this jurisdiction, not to punish.

I have the right, and I think there is a substantial question of law, certainly in the light of Judge Medina's decision, I respectfully urge that (53) this Court, in spite of my learned colleagues and all this activity on the right, that you do admit him to bail, because, as your Honor—

The Court: Was Trock admitted to bail?

Mr. Christy: I am advised by Mr. Perrotta that he was not admitted to bail in the District Court or the Circuit Court.

Mr. Perrotta: In the Court of Appeals there was a motion for bail, and the majority opinion was the result of the denial of that motion for bail.

Joseph Curcio—Defendant—By the Court

The Court: I am disinclined, Mr. Cohen, to certify that there is a question of law here. I honestly do not think there is one.

Mr. Cohen: In the light of the dissenting opinion of Judge Medina?

The Court: I have a great deal of respect for Judge Medina, but it is not the majority opinion.

Mr. Cohen: I am telling the Court that I am going to appeal and follow this through the courts.

The Court: I know you are. I assume you are going to do everything you said to me, that it was made in good faith, but I have to certify that in my opinion—or judgment, at least—there is a substantial question of law, and I would have to stultify (54) myself to say that. You do not want to ask me to do that?

Mr. Cohen: No, your Honor, but I think he should have his full right and exhaust all of his remedies.

The Court: I want him to exhaust all of his remedies.

Mr. Cohen: I think this case is somewhat—

The Court: Why don't you go up to the Court of Appeals?

Mr. Christy: I have it right here.

The Court: Go up and see Mr. Fusaro, the clerk in the Court of Appeals, and ask him what you actually need and how you can get a case like this up there.

Mr. Cohen: May I have one of the three go with me?

Mr. Christy: Yes.

Order of Noonan, *U.S.D.J.*

(1)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Joseph Curcio, having appeared before the United States Grand Jury for the Southern District of New York on April 10, 12, and 17, 1956, and having refused to answer certain questions on the grounds that the answers might tend to incriminate him, and having been directed to answer said questions by the Honorable Gregory F. Noonan, United States District Judge for the Southern District of New York, on April 17, 1956, and the defendant having appeared before the United States Grand Jury for the Southern District of New York on April 17, 1956 and having refused to answer said questions as directed by the Court and having appeared before the Honorable Gregory F. Noonan on April 19, 1956, and having refused to answer said questions when put to him by the Court; and Arnold Cohen, Esq., counsel for the defendant, and Paul W. Williams, United States Attorney for the Southern District of New York, by Arthur H. Christy (Herbert M. Wachtell and Fioravante G. Perrotta), Assistant United States Attorneys of counsel for the United States of America having been heard, and due deliberation having been had thereon and upon all proceedings heretofore had herein; it is

ORDERED that the defendant Joseph Curcio be and he hereby is committed to the custody of the United States Marshal for the Southern District of New York, to (2) be

held in close confinement for a period of six months for contempt of court and that he may purge himself of said contempt by appearing before the United States Grand Jury and answering said questions as directed.

Dated: New York, N. Y., April 19, 1956.

/s/ GREGORY F. NOONAN
United States District Judge

Certificate of Noonan, *U.S.D.J.*

(3)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

In accordance with Rule 42(a) of the Federal Rules of Criminal Procedure I hereby certify that the following acts were committed in the presence and the hearing of the Court and constitute a contempt of the Court: On April 17, 1956, the defendant Joseph Curcio appeared before the United States Grand Jury for the Southern District of New York and refused to answer certain questions on the ground that the answers might tend to incriminate him. On the same date he was brought before me and in the presence of the Grand Jury and after hearing each of the said questions read and after hearing arguments by Arnold Cohen, Esq., counsel for the defendant, and Paul W. Williams, United States Attorney for the Southern District of New York, by Arthur H. Christy and Herbert M. Wachtell, Assistant United States Attorneys, of counsel, for the United States Attorney, I directed the defendant to answer those questions.

On April 19, 1956, the defendant appeared before the United States Grand Jury for the Southern District of New York and again refused to answer said questions. He was brought before me on April 19, 1956 and in the presence of the Grand Jury I put to him said questions which he again (4) refused to answer after having been directed to do so and failed to state any reason why the answers

would tend to expose him to criminal prosecution. The questions which were asked are as follows:

"Q. I am going to ask you some questions, including some that were put to you on Thursday which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records ?

"Q. Mr. Curcio, have you ever had possession of the books and records of this local?

"Q. Did you have custody and control of these records last Thursday?

"Q. Do you have possession of hose records or any of them today?

"Q. Do you have custody and control of any of those records today?

"Q. Where are any of those records today, if you know?

"Q. Who has any of those records today, if you know?

"Q. Where were any of these records or all of these records two weeks ago today?

"Q. Where were any or all of these records a week ago Saturday?

"Q. Where were any or all of these records a week ago yesterday, Monday?

"Q. Where were any or all of these records this past Thursday?

"Q. Where are any or all of these records today?

"Q. Who, if you know, had any or all of these records a week ago Saturday?

"Q. Who had any or all of these records a week ago yesterday?

"Q. Who had any or all of these records today?

(5) Accordingly, I summarily committed Joseph Curcio to the custody of the United States Marshal for the Southern District of New York to be held in close confinement for six months for contempt of court and informed him that he could purge himself of the contempt by appearing before the said United States Grand Jury and answering the questions as directed.

/s/ GREGORY F. NOONAN
U. S. D. J.

Dated: New York, New York,
April 19, 1956.

Notice of Appeal

(6)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

JOSEPH CURCIO, Defendant-Appellant
137-07 Seventieth Avenue, Queens, New York

ARNOLD COHEN
Attorney for Defendant-Appellant
Office & P. O. Address
Two Lafayette Street
New York, New York

Offense—Contempt of Court

Pursuant to judgment and order of Gregory F. Noonan, United States District Judge, defendant-appellant on April 19, 1956, was deemed to be in contempt of Court and thereby confined to the custody of the United States Marshall for the Southern District of New York for a period of six months.

Defendant-Appellant is to be confined in the custody of the United States Marshall for the Southern District of New York as of 4 P.M., April 20, 1956.

I, the above named defendant-appellant, hereby appeal to the United States Court of Appeals for the Second Circuit from the above stated judgment and order.

Dated: New York, N. Y., April 20, 1956.

ARNOLD COHEN
Attorney for Defendant-Appellant
Two Lafayette Street
New York 7, New York

Subpena for U. S. Grand Jury

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 34-307

To Joseph Curcio
Local 269 — I. B. of T, C, W & H of America
1780 Broadway, New York, N. Y.

BY VIRTUE OF A WRIT OF SUBPENA, To you directed and herewith shown, YOU ARE COMMANDED and firmly enjoined that, laying all other matters aside, and notwithstanding any excuse, you be and appear in your proper person before the Grand Inquest of the Body of the people of the United States of America, for the Southern District of New York, at a District Court to be held at the U. S. Courthouse, Foley Square, Room 515, 5th Floor, in the City of New York, in and for the said Southern District, on the 10th day of April, 1956, at 11:30 o'clock in the forenoon of the same day, to testify all and everything which you may know in regard to an alleged violation of Section 371, Title 18, U.S.C. on the part of the United States, and not to depart the Court without leave thereof, or of the District Attorney.

AND THIS YOU ARE NOT TO OMIT, under penalty of Two Hundred and Fifty Dollars, and other penalties of the law.

Dated the 6th day of April, 1956
By the Court,

PAUL W. WILLIAMS
United States Attorney

M 10-430
F. G. Perrotta — Rm 415

Note—*Report at Room* 413. In order to secure your witness fees and mileage, it is necessary that you shall *Retain This Card* and present same at the United States Attorney's Office, Room 413, upon each day on which you attend court as a witness.

Grand Jury Subpoena Duces Tecum

M10-430 34-307

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To JOSEPH CURCIO

Secretary-Treasurer or any Official of Local 269, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA,

1780 Broadway

New York 19, N. Y.

GREETING:

WE COMMAND YOU that all business and excuses being laid aside, you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held at Room 514 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 10th day of April, 1956, at 10 o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of Title 18, Section 371, United States Code, and not to depart the Court without leave thereof, or of the District Attorney, and that you produce at the time and place aforesaid the following:

1. The following books and records for the period from Jan. 1, 1955 to present:

   a. General ledger and any and all subsidiary ledgers maintained.

   b. Cash receipts book.

   c. Cash disbursement book.

d. Petty cash book.

e. Check register and/or check stubs; cancelled checks.

f. Minute books including charter.

g. Minutes of all meetings.

h. Correspondence files.

2. Any related records or books maintained in connection with welfare funds, banquets, testimonial dinners and journals from January 1, 1955 to present.

3. Names and addresses of all members including place of employment from Jan. 1, 1955 to present.

4. Names and addresses of all officials from Jan. 1, 1955 to present.

5. Names and addresses of all employees and agents whether full time or part time, permanent or temporary from Jan. 1, 1955 to present.

And for failure to attend and produce the said documents you will be deemed guilty of contempt of Court and liable to penalties of the law.

WITNESS, the Honorable WILLIAM BONDY, Chief Judge of the District Court of the United States for the Southern District of New York, in the City of New York, on the 6th day of April, in the year of our Lord, One Thousand Nine Hundred and Fifty-Six.

WILLIAM V. CONNELL
Clerk

PAUL W. WILLIAMS
United States Attorney for the
Southern District of New York.

Grand Jury Subpoena Duces Tecum

Note: *Report at Room* 413. In order to secure your witness fees and mileage, it is necessary that you retain this Subpoena and present the same at the United States Attorney's Office, Room 413, upon each day on which you attend Court as a witness.

F. G. Perrotta
Assistant

Room 307C

THE NEW YORK TIMES

VOL. CV ¥35853 New York, Friday, March 23, 1956

Page 1, Cols. 2, 3

Teamster Leaders Seeking To Restrict Hoffa's Power

Union Board Is Expected to Veto $400,000 Loan Promised to I. L. A.

By A. H. RASKIN

Special to The New York Times.

HONOLULU, March 22—A move to check the fast-expanding power of James R. Hoffa developed today in the high command of the International Brotherhood of Teamsters.

The sponsors of the move expressed certainty that they would muster enough votes in the union's executive board at its meeting here next week to "put the brakes" on Mr. Hoffa's progress. The Detroit unionist, who ranks ninth in the list of eleven teamster vice presidents, has made himself the dominant figure in the union's affairs in the Midwest, East and South.

The first aim of his critics on the board will be to block a loan of $400,000 to the International Longshoremen's Association, which Mr. Hoffa negotiated. The pier union was expelled from the American Federation of Labor in

Continued on Page 20, Column 4

Lacey Begins a Suit Here to Deny Presidency of Council to O'Rourke

By STANLEY LEVEY

A court fight to keep John J. O'Rourke from taking the $25,000-a-year presidency of the Teamsters Joint Council was opened yesterday.

Martin T. Lacey, the incumbent, in a suit filed in Federal Court, warned that if Mr. O'Rourke were permitted to take office the council's 125,000 members would be "subject to the arbitrary and ruthless control and decision of gangsters, racketeers and others."

Mr. O'Rourke, the protégé of James R. Hoffa, Midwest teamster boss, was declared the winner of last month's deadlocked union election on Wednesday when sixteen challenged ballots were opened and counted. All sixteen went to Mr. O'Rourke and his six-man slate, giving him a five-vote victory over Mr. Lacey.

The first result of Mr. Lacey's

Continued on Page 20, Column 1

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LACEY FILES SUIT TO BAR O'ROURKE

Continued From Page 1

legal action was a temporary restraining order issued by Federal Judge Gregory F. Noonan. The directive preserved the status quo and forbade the council's executive board from taking any steps to disturb Mr. Lacey's incumbency.

The order will freeze council affairs until April 3. On that date the executive board will be required to show cause why a temporary injunction should not be issued.

Besides Mr. O'Rourke, Mr. Lacey's suit named as defendants the joint council, which is the governing body for fifty-seven teamster locals in the New York area, Mr. Hoffa, Dave Beck, international president; John S. English, international secretary-treasurer, and Louis Lufrano, secretary-treasurer of the council.

Mr. Lacey specifically charged that Mr. Hoffa "was an active and chief member of the common effort or conspiracy to rig or influence the election by fraud, deception and stratagem, as well as by intimidation and persuasion."

According to the papers in the suit, this was how Mr. Hoffa operated: "He established himself in a local hotel prior to the Feb. 14 election and required many delegates to visit him there so that he could convince them to vote for the O'Rourke slate."

So confident was Mr. Hoffa about the nature of the sixteen challenged ballots, Mr. Lacey alleged, that the day after the election he asserted that all sixteen would go to Mr. O'Rourke even though they had been sealed in individual envelopes.

Mr. Lacey's suit, which was filed by Godfrey P. Schmidt, his counsel, asserted also that to aid the O'Rourke slate "seven new and suddenly contrived locals" were chartered. None of the officers of these groups were known to be "genuine labor leaders," the suit said.

"Some [of the locals] were and are officered by criminals or racketeers," Mr. Lacey declared. "Some were located, according to their stationery, at nonexistent addresses. None were formed after just consideration or pursuant to constitutional allotment of jurisdiction. None gave any but fraudulent indication of the number of its membership."

These charges were in language similar to that used two weeks ago by District Attorney Frank S. Hogan. At that time he said "underworld forces are making a determined effort to capture control" of the joint council. As leaders of this drive he named John (Johnny Dio) Dioguardi and Anthony (Tony Ducks) Corallo, both of whom have prison records.

NEW YORK POST
Wednesday, January 25, 1956

The Phantoms

By Murray Kempton

A mixed bag of HOI and POLLOI is currently seeking to snatch control of the 175,000 member New York Joint Council of the International Brotherhood of Teamsters.

The stake is something more than the $25,000 job of Martin Lacey, the council's president; it is whatever hope there is of keeping James Hoffa, a man of the most flexible morals, from full control of the country's largest union.

There are 63 locals in the Joint Council. As things now stand, they are almost evenly divided betwen Lacey and John J. O'Rourke, the facade for the forces of darkness.

In November, O'Rourke's backers decided to put a little lead in the dice. They found some unknown friend in the international who agreed to charter seven new locals. These have applied to the joint council for membership; if they are permitted to vote in next month's election, they will cast 49 votes for O'Rourke, which could be a margin of safety.

Every local in the council, whatever its size, has seven votes in the Lacey-O'Rourke contest. The seven neophyte locals applied for membership on a grand total of some 350 members; they hope to win the election at a cost of $350 in cash per capita. And, such are the wonders of democracy that, if they are seated, they will cast 10 per cent of the votes while they represent at best less than two-tenths of one per cent of the members.

That may be an inflation. For, they are in most cases mere paper auxiliaries of locals of the United Auto Workers-AFL controlled by John Dio, a convicted extortioner and the only individual ever ordered out of the AFL by official action of its Executive Council.

• • •

Locals 363 and 651, both newly and duly chartered by the Teamsters International, have an address of record at 119 West Columbia St., Hempstead, L. I. (Even that statement is dubious: Local 651 feels so hopeless about its chances of communicating with employer or worker that it allowed the [redacted] its letterheads to botch its address as "11 Columbia St.," which does not even exist.)

A sign on the Columbia St. building reads Local 362-651 (I. B. of T.-AFL); it has been nailed over a similar sign proclaiming this as the headquarters of Local 228, (U. A. W.-AFL). Both the new and the old appear to be poltergeists; the employes of a driving school which is the only tenant say they have never seen an official of the local there.

The new Local 258 lists its address as 10 Park Av., Mount Vernon. That building has no sign or indication of the existence of a Local 258; the only union present is Local 228 (coin machines) of the Teamsters, an already seated member of the Joint Council. Sam Getlan, secretary-treasurer of Local 228, is applying for a seat in the Council as president of Local 258.

The secretary-treasurer of this particular figment is Henry Davidoff, convicted once of burglary, once of attempted extortion, and once of bookmaking.

• • •

Davidoff is already vice president of United Auto Workers-AFL Local 649, whose 800 members pay him in excess of $300-a-week and provide a Cadillac from the welfare fund. And Local 649 has its own phantom applicant for seven votes in the Teamsters' election; the new Local 269 of the I. B. of T. has its office at 649's headquarters and one Joseph Cucio is secretary-treasurer of both.

Early in December, the police raided John Dio's new public relations office at Equitable Research Associates at 250 W. 57th St. on the unfounded charge that it was a hangout for bookies. One of those found in the office was this same Joseph Cucio, who has two charters from AFL-CIO internationals and takes his case with a hoodlum.

Dave Beck, the bowl of jello who is the Teamsters' president of record, apparently is in no position to ask questions about this sort of thing. The Executive Council of the AFL-CIO should be. And, if it isn't, the Justice Dept. certainly is.

THE NEW YORK TIMES

VOL. CV #35037 New York, Wednesday, March 7, 1956

Page 1, Col. 4

U. S. JURY TO SIFT INDUSTRIAL CRIME

New Panel Is Told to Look Especially for Trucking and Garment Rackets

By EDWARD RANZAL

A sweeping investigation into charges of widespread racketeering in the trucking and garment industries was started yesterday by a new Federal grand jury.

Judge Archie O. Dawson told the panel of twenty men and three women they might find it necessary also to investigate other branches of trade and commerce "without regard to where the chips may fall."

United States Attorney Paul W. Williams described the inquiry as "a general crackdown on crime and racketeering in this city." He added that a number of "specific instances of racketeering" already had been brought to his attention by the Federal Bureau of Investigation.

"This information," he said, "will be presented immediately to this jury. There is no doubt that Federal crime and racketeering on a national scale exist in this city, and it is our intention to root it out."

Mr. Williams indicated that the investigation might take several months.

The garment industry is New

Continued on Page 28, Column 3

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U. S. JURY TO SIFT INDUSTRIAL CRIME

Continued From Page 1

York City's largest manufacturing activity, estimated at close to $2,000,000,000 annually.

Mr. Williams said he would be assisted in presenting the evidence to the grand jury by Assistant United States Attorney George S. Leisure Jr.

Judge Instructs Grand Jury

"We hear a great deal today about a substantial obstruction to the free flow of commerce by reason of tribute exacted by professional racketeers and by unscrupulous officers and agents of labor organizations who use the power of their organizations not for the benefit of the union members but for their personal individual gain."

He said recently published articles indicated that in the trucking and dress industries in New York "gangsters and racketeers have acquired control of unions and even of businesses for the purpose of extorting money for their individual benefit at the expense of workingmen and women and of the consumers who buy or utilize their products."

"If these accusations are true," he continued, "then the public is entitled to see that these illegal activities are uncovered, prosecutions ensue, and such intolerable conditions no longer be allowed to prevail.

"I would suggest that this grand jury make a careful investigation of charges of racketeering in these industries and in any other industries which come to your attention, without regard to where the chips may fall."

The jurist told the panel it was its duty to see that any criminal, racketeer, gangster or extortionist operating in the community and violating Federal law by interfering with the flow of interstate commerce was brought to justice.

THE NEW YORK TIMES

VOL. CV No. 35,844 New York, Wednesday, March 14, 1956

(P 53)

Page 1, Vol. 1 Page 27, Col. 1.

UNITED DRIVE SET ON CITY RACKETS

Williams, Hogan and Javits Act to Fight 'Invaders'

By EDWARD RANZAL

A combined effort by United States Attorney Paul W. Williams, District Attorney Frank S. Hogan and State Attorney General Jacob K. Javits to drive racketeers from New York industries was started yesterday.

Mr. Williams said all three had agreed to work together because racketeers were "trying to invade New York City and take over the full role of invaders in many industries."

The unified drive, Mr. Williams explained, will extend to all phases of racketeering in city industries, including the garment, trucking, food and small merchandise fields.

The Federal prosecutor declared that he and Mr. Hogan would use the "squeeze play" to ferret out the racketeers. Mr. Williams explained that if Mr. Hogan was unable to get two accomplice witnesses for a case as required under state law, he might take over because Federal law required only one accomplice as a witness.

He also said that if his office turned up evidence of embezzlement or theft, which are not Federal crimes, he would give the information to Mr. Hogan. Such evidence may come to Mr. Williams because Federal tax returns are available to him.

Mr. Javits has offered the full

Continued on Page 27, Column 1

PROSECUTORS MAP DRIVE ON RACKETS

Continued From Page 1

cooperation of his office and has opened his files to Mr. Williams. As a result, Assistant United States Attorney Arthur Christy, head of the criminal division, now is "poring over papers in Mr. Javits' office."

Among other things, Mr. Javits' office investigates possible monopolies in business in the state. He has indicated to Mr. Williams that some of these investigations have turned up evidence that would be of interest to the Federal prosecutor.

It was as a result of this that Mr. Williams widened his racketeering investigation into the food business.

"I have talked extensively with Mr. Hogan," he said, "and we have agreed to work together in all phases of our investigation, including that involving Louis B. Saperstein."

Saperstein, wealthy insurance broker, who was wounded critically last Saturday morning in Newark, was understood to have been cooperating with Mr. Hogan in an investigation involving union welfare funds.

"This is a unified drive on racketeers who are trying to invade New York City and trying to take over the role of invaders for the first time since the time of Tom Dewey, and all evidence seems to indicate that," Mr. Williams said.

Thomas E. Dewey served as District Attorney before he became Governor. He is now engaged in the private practice of law.

A week ago a Federal grand jury was impaneled to investigate charges of widespread racketeering in the trucking and garment industries. Since then the investigation has mushroomed, and a special grand jury will be sworn in tomorrow to assist in the inquiry.

Mr. Williams said he also was determined to see how far racketeers had penetrated into business on the retail level.

The Federal prosecutor explained that he was not going after organized labor and would not interfere or intervene in disputes between labor leaders.

The racketeer today, he said, is more sophisticated than his predecessors and knows better how to hide his crimes. The present breed is not so naive as to expose himself with book entries, he explained.

THE NEW YORK TIMES

VOL. CV #35,844 New York, Friday, March 16, 1956

Page 1, Col. 1

U. S. Racket Inquiry Extended to Foods

By EDWARD RANZAL

In a widening inquiry a special Federal grand jury was impaneled yesterday to investigate violence, extortion and racketeering in the food industry and small businesses.

"Racketeers, not of the stature of Lepke and Gurrah, but of their breed, have moved in, and the end result has cost consumers millions of dollars," United States Attorney Paul W. Williams said.

Louis (Lepke) Buchalter and Joseph (Gurrah) Shapiro were two hoodlums who terrorized the garment industry in the early Nineteen Thirties. Lepke was executed for murder and Gurrah died in Sing Sing Prison while serving an extortion sentence.

The Government's racketeering investigation started last week when a regular grand jury

Continued on Page 31, Column 5

Page 31, Col. 5

U. S. RACKET QUEST EXTENDED TO FOOD

Continued From Page 1

was told to look into such activities in the garment and trucking industries.

Another Special Panel

Because of the widening scope of the inquiry, Mr. Williams will have a second special panel sworn in on March 26. He anticipated that the investigation might take six months.

Mr. Williams said the Government already had subpoenaed fifty witnesses. He added that a number of other prospective witnesses had "conveniently" disappeared. The problem, he asserted, was to convince persons who have been victims to come forward.

The garment and trucking investigation is being handled by Assistant United States Attorney Arthur Christy, chief of the criminal division. Assistant United States Attorney Myles J. Ambrose is in charge of the food and small business inquiry.

Mr. Ambrose said that "the initial phase of the investigation will be a probe into the pickle industry; it started with kosher pickles, but is getting bigger all the time."

"We know that a unique type of racket is in operation in that industry," he continued, "and it has a lot to do with the fact that groups of employers band together to keep their businesses among themselves and they use labor unions to enforce that monopoly."

The food industry, Mr. Ambrose continued, is "most susceptible to racketeering because the goods it handles are perishable."

As for small businesses, he said, a "particularly vicious type of racketeering exists whereby a small plant is unionized and the employer pays union dues and funds to a non-existent welfare fund as a means of tribute to illegitimate unions."

He said most of the racketeering could be laid to a "group of illegitimate unions which are engaging in anything they can find which will be profitable."

In addressing the panel yesterday Federal Judge Archie O. Dawson said:

"Racketeering is not something new. It has simply developed new phases in modern days. In old medieval times, bandits would set themselves up along the crossroads of commerce and exact tribute from legitimate business men who wished to pass that way in the course of their commerce.

"Today, that same type of thing, which is called racketeering, goes on, but it goes on in a more subtle form.

"The exacting of tribute from business men for permission to carry on their legitimate business activities is a drain upon the whole community."

THE NEW YORK TIMES

VOL. CV #35860

New York, Friday, March 30, 1956

Page 1, Col. 2

Page 20, Col. 3

(p.56)

7 TEAMSTER UNITS FACE U. S. INQUIRY

New Rackets Grand Jury Will Focus on Gangsters —List of 16 Is Read

By EDWARD RANZAL

The primary concern of a newly created special Federal rackets grand jury will be an investigation of seven recently chartered teamster locals and their officers.

The core of the investigation into racketeering in the garment and trucking industries will, however, center on many known gangsters who operate under a cloak of respectability in both industries.

This became evident yesterday when United States Attorney Paul W. Williams read a list of sixteen names to prospective jurors before they were sworn in by Federal Judge Archie O. Dawson. One prospective juror was excused when he said he knew one of the men on the list.

Meanwhile, the regular March grand jury, which had been empowered to initiate the inquiry, returned its second racketeering indictment. It charged five truck company employes with stealing more than $100,000 worth of merchandise since 1954.

Although four witnesses had been subpoenaed to testify yesterday, only one was questioned by the new panel. Assistant United States Attorney Arthur Christy, in charge of the criminal division, is presenting evidence to the grand jury.

The seven new teamster locals will be investigated because of charges by Martin T. Lacey,

Continued on Page 20, Column 3

7 New Teamster Locals Facing Inquiry by Federal Racket Jury

Continued From Page 1

president of the Teamsters Joint Council.

Mr. Lacey recently lost a hotly contested union election for the presidency to John J. O'Rourke, protégé of James R. Hoffa, powerful Midwest teamster boss. However, Mr. O'Rourke has been restrained from taking office by a court suit brought by Mr. Lacey.

In his court action Mr. Lacey charged that the new locals were organized "for the purpose of rigging the election." He added that some of the locals "were and are officered by criminals or racketeers; some were located, according to their stationery, at nonexistent addresses."

Mr. Lacey further charged that "none of the officers of the newly chartered locals were known to be genuine labor leaders."

Last Monday Mr. Christy conferred with Mr. Lacey for several hours.

The sixteen names read by Mr. Williams to the grand jury represented union officials, business men and racketeers, some of whom were closely associated with Louis (Lepke) Buchalter and Jacob (Gurrah) Shapiro, gangsters in the early Thirties.

The 16 Key Names

Mr. Williams first read to the grand jury the names of Messrs. Hoffa, Lacey and O'Rourke. The others named were John DiGuardi, alias Johnny Dio, labor racketeer convicted of extortion; Joseph Stracci, alias Joe Stretch, a criminal with a long police record who has been active in nonunion garment shops.

Also Ben Kutlowitz, alias Tom Cutty, connected with nonunion garment companies; Ben Levine, manufacturer and one-time close associate of Lepke and Gurrah; Izzy Schwartz, union official with a long police record; Abe Chait, boss trucker and dress manufacturer with a long police record.

Also James Plumeri, alias Jimmy Doyle, prize fight owner with garment and trucking interests and a police record; Anthony Strollo, alias Tony Bender, notorious underworld character; Tom Lucchese, alias Three Finger Brown, manufacturer closely associated with underworld figures; Harry Strauss, alias Harry Strasser, a "front man" in the trucking industry with a police record.

Also Morris Shapiro, alias Little Sheppi, alleged collector for racketeers; Abe Gordon, president of Local 805 of the Teamsters; Albert Anastasia, linked with Murder, Inc.; Louis Lieberman, alias Scarface Louie, mobster convicted of extortion; Harry Davidoff, official of one of the new teamster locals, who has a criminal record, and Sam Berger, president of Local 102 of the International Ladies Garment Workers Union.

Strikes, Boycotts Threatened

No clear pattern has yet been established by the United States Attorney's office. It was noted, though, that the strong-arm methods of the past were no longer used. Instead, it was said, the racketeers are able to extort money from business men under the threat of illegal strikes and secondary boycotts.

Judge Dawson told the grand jury that "in our complex society there is nothing more inimical than racketeers preying on reputable business men and interrupting the free flow of commerce."

The five men indicted—they were charged with stealing women's dresses, piece goods, cloth and children's coats—were employes of the Yale Transportation Company of 460 Twelfth Avenue.

Wellington Newcombe, assistant United States Attorney, said the men had joined in a conspiracy to steal the merchandise from stations, depots, platforms, trucks and other vehicles.

The five, said to be drivers or platform men, were John Angelo, 37 years old, of 501 West Fifty-seventh Street; Pinkas L. Caldes, 36, of 160 Allen Street; Frederick Esposito, 26, of Hoboken, N. J.; Michael E. Gigante, 28, of 1919 Avenue X, Brooklyn, and George J. Liverani, 27, of 2810 Harway Avenue, Brooklyn.

They will be arraigned in Federal Court next Friday. If convicted they could receive a maximum of ten years and a $5,000 fine each.

MAN TO CONTEND WITH: MR. JIMMY HOFFA

He is strong man in a union that affects everyone

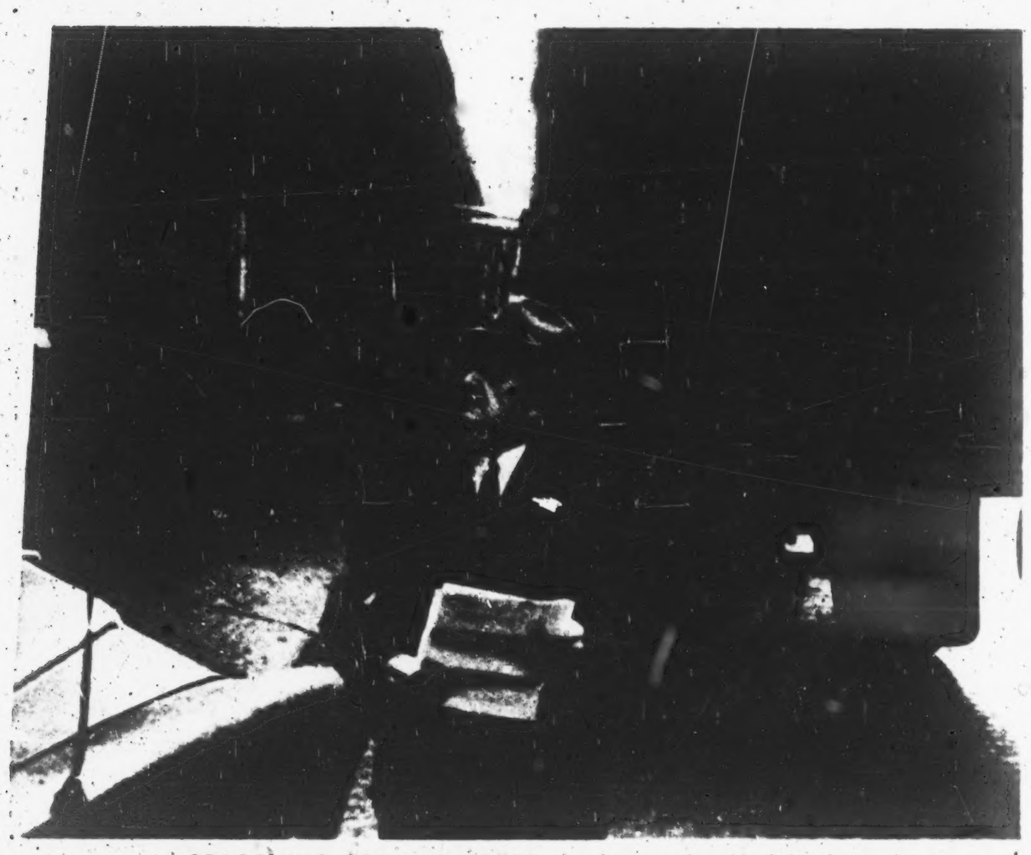
A bare four months after the merger of the A.F. of L. and the C.I.O. brought American labor to a historic peak of power, prestige and respectability (LIFE, Dec. 12), the labor movement faced a major challenge to its reputation and stability. The threat is a tough, cocky, ex-warehouseman from Detroit named Jimmy Hoffa, who boasts, "I got a list of arrests maybe as long as your arm." By title, Hoffa is the ninth vice president of the International Brotherhood of Teamsters. In fact he has all but eclipsed the power of the Teamsters' once formidable president, Dave Beck. Through the flow of goods its 1.3 million members control, the Teamsters is one of the most powerful of U.S. unions. It is also one of the unions most ridden by racketeers. Hoffa emerges as a man the whole country – not only the labor movement – will have to contend with.

Last week two facets of Jimmy Hoffa's ruthless and continuing drive to expand his power had highballed him into national prominence and had focused attention on his chummy relations with hoodlum elements in and out of the union. In Manhattan a federal grand jury was preparing to investigate Hoffa's recent attempt to force his own man in as head of the Teamsters' New York joint council. Charges were made in court that Hoffa had rigged the election by setting up phony locals (*next page*) which are controlled by ex-convicts.

At the same time the Teamsters' executive board, meeting in Hawaii, grappled with Hoffa's move to bring New York's longshoremen into his Teamster orbit. In 1953 the International Longshoremen's Association was expelled from the A.F. of L. for persistent corruption. This winter, as part of a mutual assistance pact which could give the Teamsters paralyzing control over virtually all East Coast truck and ship movement, Hoffa offered to lend the I.L.A. $400,000. George Meany, president of the combined A.F.L.-C.I.O., threatened to expel the Teamsters if the loan were made. Under pressure, the Teamsters' board quashed the loan. But it carefully gave Hoffa a go-ahead with his mutual assistance pact.

BEDECKED LIKE TOURISTS, TEAMSTERS' PRESIDENT DAVE BECK AND HIS

LOVE FEST WITH LONGSHOREMEN in New York found Hoffa in February – getting I.L.A. to take $400,000 loan. Joining hands from left: I.L.A. Organizer Teddy Gleason and President William Bradley; Hoffa; Johnny O'Rourke; Harold Gibbons of Teamsters Central Conference; Thomas Flynn, Eastern Conference.



SEARCHING FOR WITNESSES to subpoena for the federal grand jury investigation, Deputy U.S. Marshal James Shanahan explores New York truck center.

RIVAL, JIMMY HOFFA, CONFRONT EACH OTHER AT THE EXECUTIVE BOARD MEETING IN HAWAII

PICKED BY HOFFA to head New York Teamsters, Johnny O'Rourke is barred from office pending court hearing.

REJECTED BY HOFFA, Martin Lacey, incumbent head of New York Council, said to Void his defeat by O'Rourke.

CONTINUED 55

"JOHNNY DIO" (*right*), whose real name is John DioGuardia, and his uncle James Plumeri stood trial in 1937 for running an extortion racket in garment district. DioGuardia was convicted, got 3 to 5 year term, later did time for tax evasion. Hoffa's man Johnny O'Rourke admitted he has known Dio for 30 years.

HELPING HAND FROM RACKETEERS

Manhattan District Attorney Frank Hogan has helped spell out how Hoffa's techniques rigged the election of Johnny O'Rourke as head of the Teamsters' Joint Council. Hoffa's agents chartered seven new locals. Most, on checking (*right*), proved to be little more than letterhead units. All, says Hogan, are controlled by ex-convicts Johnny DioGuardia (*above*) and Anthony Corallo (*bottom*). They are chief among the characters (*top row*) whose roles in the union a federal jury will seek to pin down. Because of the uproar over the action, the votes of the phantom locals were impounded. But the Hoffa forces had already lined up some even stranger votes to defeat the popular incumbent, New York council president Martin Lacey. They cast seven from a local which had never paid dues, six from a Yonkers local whose president is appealing a conviction on extortion charges, one vote from O'Rourke's bodyguard, who is no union official but voted for a man who had died a few days earlier. These votes, now challenged in court by Lacey, gave O'Rourke his victory.

At least a dozen Teamsters officials have been convicted of major crimes since 1953. Asked if a stop-Hoffa movement was under way in the Teamsters, Dave Beck snorted, "I wish I had 40 more men like him."

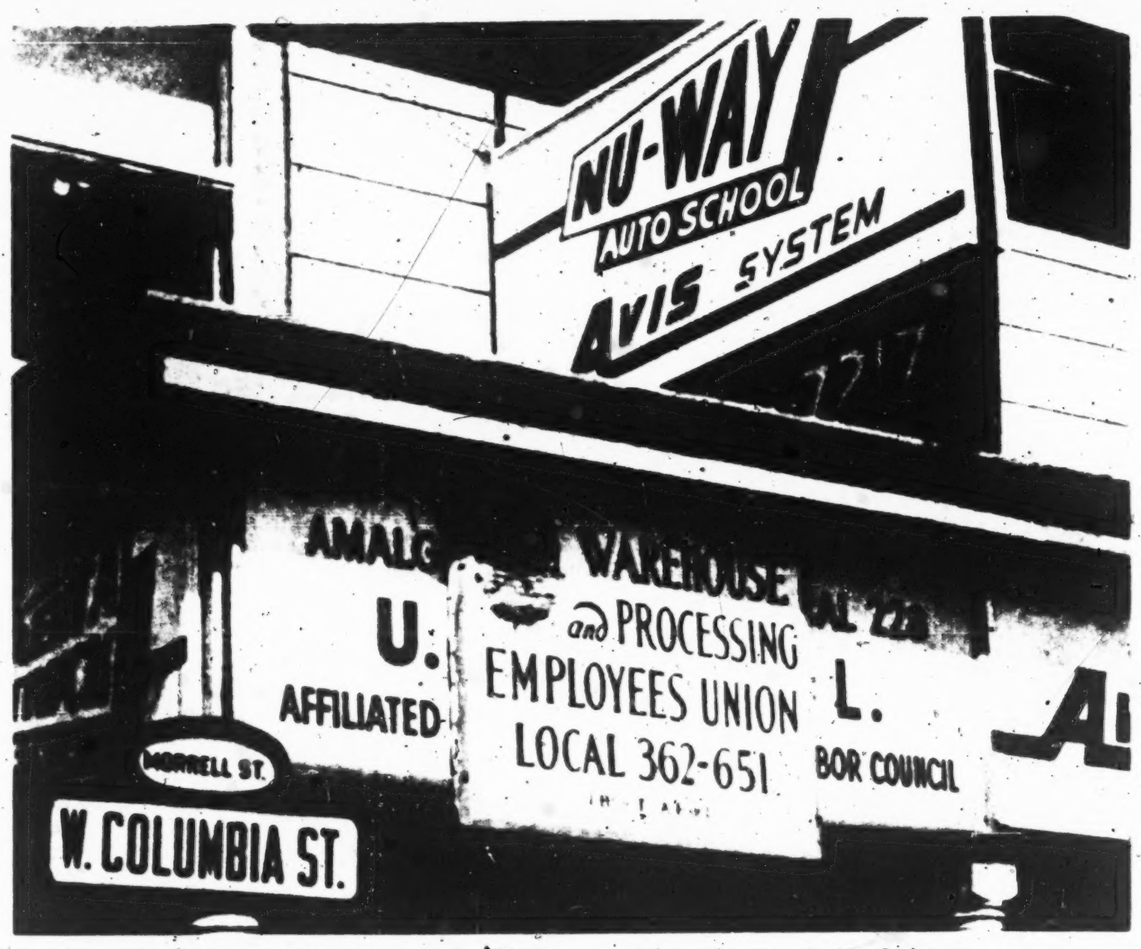
"TONY DUCKS" (*center*), whose real name is Anthony Corallo, stood for police picture in 1936 with associates John Linardi (*left*), Joe Benintende. He has a record of 12 arrests, but only one conviction—for narcotics possession. Vice president of Teamsters New York local 239, he is believed to control five other locals.

ON THE NEW YORK ROSTER

IRVING SLUTSKY, vice president of local 275 which Tony Ducks Corallo controls, has been indicted for extortion as official of clerks union.

SAM BERGER, no teamster but business manager of the Garment Workers' truck local, helped Dio get union charter in A.F. of L. Auto Workers.

HIDE-OUTS OF PHANTOM LOCALS



"LOCALS 362 AND 651," set up by Hoffa, rent littered office behind this car-rental agency in Hempstead, Long Island. Sign is only evidence of their presence.

HOFFA'S MIDWEST SUBORDINATES

LOUIS TRISCARO, head of Cleveland local 436, has assault robbery record. A House committee found he was taking 15% of union welfare fund.

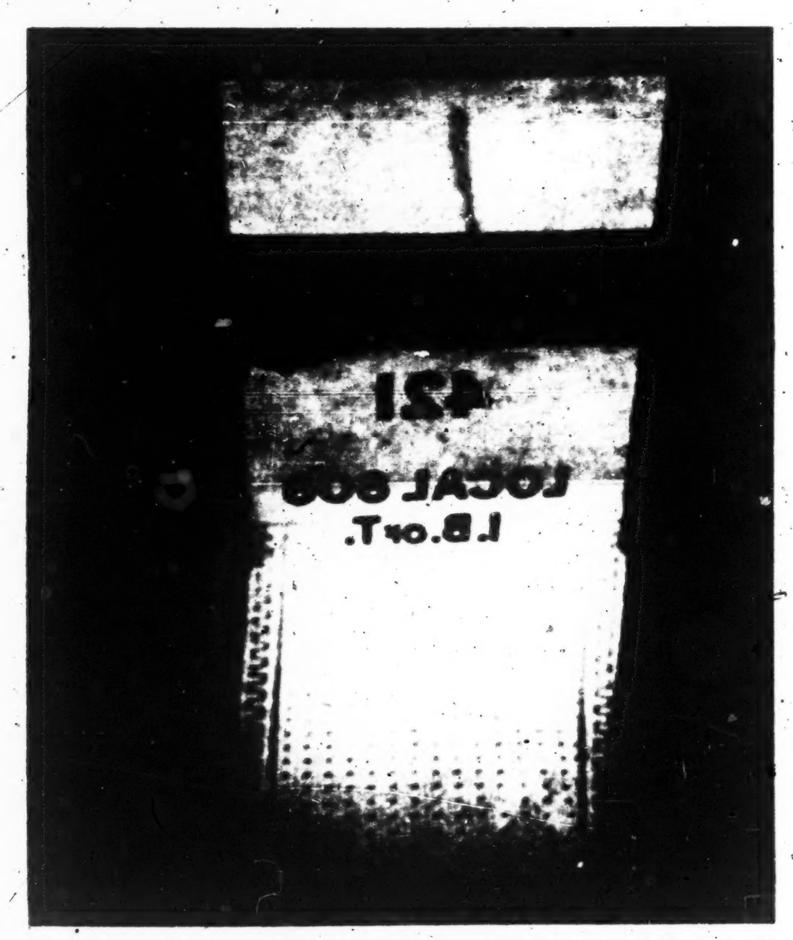
BARNEY BAKER, onetime secretary-treasurer of St. Louis local 405 who has been organizing in Buffalo, has a police record dating back to 1937.

JOSEPH STRACCI, also known as Joe Stretch, did time in Sing Sing for grand larceny and has been arrested for rape, burglary, assault, narcotics.

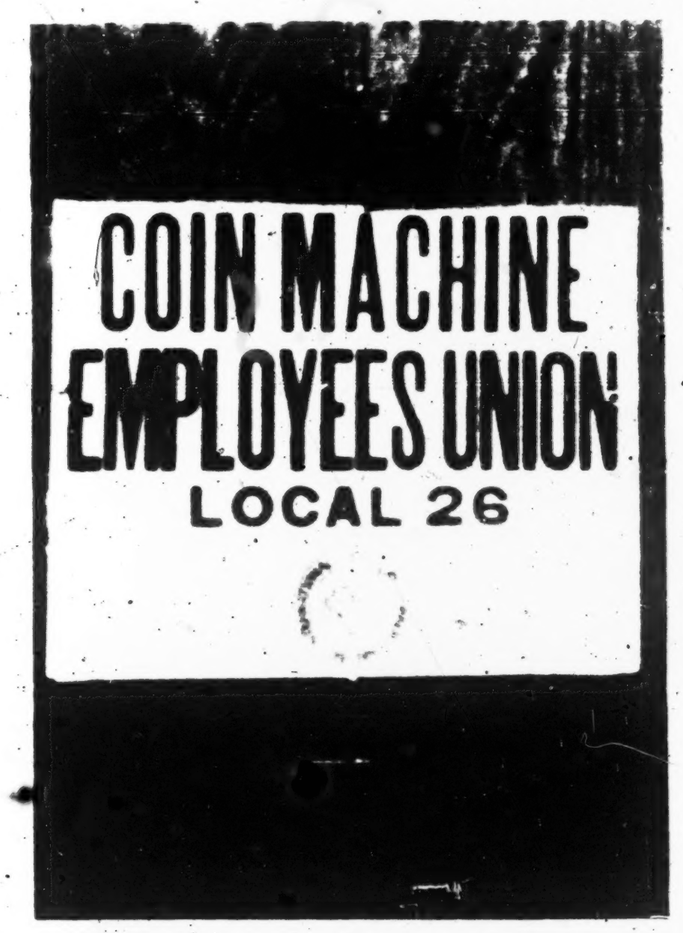
ABE GORDON, an official of local 805, spent $85,000 of union trust fund to buy property from a cousin. He voted for Hoffa's man, O'Rourke.

THOMAS LUCHESE, alias Three-Finger Brown, is leading underworld figure. The federal jury will check him for connections with Teamsters.

LOUIS LIEBERMAN got four years for extortion after posing as union agent. He has a long police record, many arrests for felonious assault.

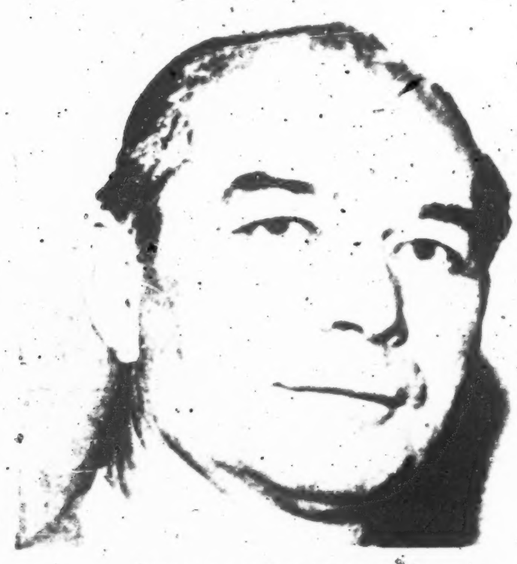


"LOCAL 295" has the same office as existing local 808 and same treasurer, a pal of Johnny O'Rourke.



"LOCAL 258" was listed at this address, but only a coin machine union sign shows on the door.

"LOCAL 269" is added to door of A.F. of L. auto worker local whose president has criminal record.



GERALD CONNELLY quit as organizer for Minneapolis local 548 jailed for bombing teamster's home; he faces trial for second bombing.

BRYANT FLICK, Connelly sidekick and an ex-organizer for Minneapolis local 548, was convicted of one bombing, faces trial for another attempt.

LAWRENCE THOMPSON, former business agent for local 571 at Cape Girardeau, Mo., is serving 12 years for extorting $15,000 from a contractor.

ERNEST ANDERSON heads Kansas City local 541. A former president of 541 was slain. Often arrested, he has been convicted of assault, theft.

[fols. 61-63] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Appellee's Appendix

Grand Jury Testimony

UNITED STATES GRAND JURY

SOUTHERN DISTRICT OF NEW YORK

Title 18 U. S. Code §371

Re Investigation of John Doe

TRANSCRIPT OF TESTIMONY

Witness: JOSEPH CURCIO.

Dates: April 10th, 12th, and 17th, 1956.

APPEARANCES:

Arthur H. Christy, Herbert M. Wachtell, Fioravante G. Perrotta, Assistant United States Attorneys.

[fol. 64] April 10, 1956.

JOSEPH CURCIO, called as a witness, first having been duly sworn by the Foreman, testified as follows:

By Mr. Christy:

Q. Will you give your full name, please?
A. Joseph Curcio.
Q. Mr. Curcio, where do you live?
A. 137-45 70th Road, Flushing, New York.
Q. What is your occupation?
A. Before making any further statements I would like to have my attorney present.
Q. I will advise you, Mr. Curcio, that this is a grand jury proceeding and you are not entitled to have your attorney present during this proceeding.
A. Well, I haven't had time to talk with him, as Mr. Perrotta knows.

Q. I will advise you that if any question is put to you by any of the Assistants or any members of the grand jury and you feel that the answer to that question will incriminate you you have a right to refuse to answer that question. I will also say to you that you realize that if you give the grand jury any deliberately untruthful answers it may lead to perjury action, or any wilful refusal to answer any questions may lead to a contempt action. Do you understand that?

A. Yes, sir.

Q. I will put the question to you again, Mr. Curcio. What is your occupation?

A. I still won't answer until I have advice from my attorney.

Q. What are the grounds on which you refuse to answer the question?

A. I would like to have the advice of my attorney before making any statement whatsoever or answering any questions.

[fol. 65] Q. I will advise you that that is not a sufficient reason for refusing to answer a question.

A. That is all I have to say.

The Foreman: You have just taken a pledge, an oath.

The Witness: I would like advice of counsel.

The Foreman: You should have gotten it before you came into the room.

The Witness: I spoke with Mr. Perrotta this morning. I was subpoenaed yesterday afternoon. I tried to contact my lawyer and he was in Albany.

(Mr. Christy, resuming:)

Q. Who is your attorney?

A. Arnold Cohen.

Q. C o h e n?

A. Yes.

Q. Where are his offices?

A. Two Lafayette Street.

Q. Have you made an effort to get in touch with your attorney today, Mr. Curcio?

A. No further questions to be answered, sir.

Q. Your attorney is in New York you know. You know that he is in New York, do you not?

A. I'd like my attorney here.

The Foreman: You couldn't have him in the room. No one can be in here.

The Witness: I have nothing further to say.

Q. Have you made an effort to call him today?

A. (No answer.)

[fol. 66] Mr. Christy: Mr. Foreman, I ask that you direct the witness to answer that question.

The Foreman: I am sorry, you are going to have to answer it.

Mr. Perrotta: Isn't it a fact that your attorney knows at the present time that you are before the grand jury?

Mr. Christy: Will you direct the witness to answer that question?

The Foreman: Will you answer the attorney, please?

The Witness: I have no statement to make.

The Foreman: You refuse to answer?

The Witness: I would like to have my attorney here.

The Foreman: Do you refuse to answer the specific question?

Mr. Christy: What did you say?

The Witness: I haven't said anything.

The Foreman: But you do refuse?

The Witness: Yes, sir.

The Foreman: One moment ago you took an oath, "so help you God" it ended with.

(Mr. Christy resuming:)

Q. At what time were you served with a subpoena yesterday?

A. I have no answer.

Q. Were you served with a subpoena yesterday? I think you indicated a few minutes ago that you were. Were you served with a subpoena yesterday?

A. I have no further answers.

[fol. 67] Mr. Christy: Mr. Foreman, I request that you excuse this witness for a few minutes.

The Foreman: You are excused.

Mr. Christy: And that he be directed to remain outside the grand jury room.

The Foreman: Will you please wait outside?

The Witness: Thank you.

(Witness leaves room and is later recalled.)

By Mr. Christy:

Q. Mr. Curcio, were you served with a subpoena?

A. I have no answer.

Q. When were you served with a subpoena for your appearance today?

A. I have no answer.

Q. Did you attempt to get in touch with your attorney yesterday?

A. I have no answer.

Q. Have you attempted to get in touch with your attorney today?

A. I would like to have my attorney here.

Q. You have indicated to these questions that you have no answer. What is the reason for that?

A. I would like my attorney present.

The Foreman: You mean in the room?

The Witness: I would like to talk with him.

The Foreman: Where?

The Witness: To confer with him.

The Foreman: On every question that would be submitted?

The Witness: To find out what my rights are. I don't know what my rights are here.

The Foreman: No one is allowed to have an attorney [fol. 68] in the room, that's obvious; that's factual. So you couldn't have him in the room with you.

The Witness: I would still like to confer with him.

The Foreman: Where, outside? You can't have him in here. If you had him outside and conferred with him, then what?

The Witness: I haven't had an opportunity to confer with him at all.

Mr. Christy: Have you attempted to get in touch with your attorney today?

The Witness: I have no answer.

By Mr. Wachtell:

Q. Do you mean that you refuse to answer the question?

A. I would like my attorney present.

Q. When you say you have no answer, do you mean that you are refusing to answer?

A. Yes.

By Mr. Christy:

Q. And every time you have said "I have no answer" you mean you refuse to answer?

A. No: I would like to have my attorney present and confer with my attorney. You are throwing legal stuff here and I don't know whether you are trapping me or not.

The Foreman: Up to this point there isn't——

The Witness: Up to this point, your honor, I haven't spoken with my attorney.

The Foreman: There are no questions that have any legal bearing. They are merely addresses and time.

[fol. 69] The Witness: I still haven't spoken with my attorney.

The Foreman: Mr. Christy advised you at the beginning, where there is a question where the advice of a lawyer is necessary, you can refuse to answer.

The Witness: I don't know what may be going on with this testimony, what my rights are and what I may answer and not answer, I don't know, and until I do know I am not going to make a statement.

Mr. Christy: Have you attempted to get in touch with your attorney today?

The Witness: I have no answers.

Mr. Christy: Would you excuse the witness and direct him to remain outside the grand jury room?

The Foreman: Yes.

(Witness excused.)

Witness was brought back in.

Foreman: Mr. Curcio, we're going to excuse you for today but we're going to direct that you come back Thursday, this week, April 12th.

Witness: Yes, sir.

Foreman: At 2:15.

Witness: Very good.

Foreman: With the books and records that were asked for in the subpoena duces tecum that you received.

Witness: Yes.

[fol. 70] Foreman: Which you acknowledged earlier. In the meantime we suggest to you that you take advantage of your own suggestion and get your attorney to talk with you.

Witness: That's all I want.

Foreman: Thursday.

Witness: Fine, 2:15?

Foreman: We'll expect you April 12th.

Witness: Yes, sir.

Foreman: Be sure those books and records are here. Those are the books and records asked for, in Local 269.

Witness: Uh-hum.

Witness goes out.

April 12, 1956.

JOSEPH CURCIO, recalled as a witness, having again been duly sworn by the Foreman, testified as follows:

By Mr. Wachtell:

Q. Will you state your full name, please, sir?

A. Joseph Curcio, C-u-r-c-i-o.

Q. Mr. Curcio, you were here the day before yesterday, is that true?

A. Yes, sir.

Q. On Tuesday?

A. Yes, sir.

Q. At that time you were directed to return today, is that correct?

A. Yes, sir.

Q. On Tuesday you requested that you be allowed to

[fol. 71] consult with an attorney, and perhaps bring an attorney with you to sit in the ante-room, is that correct?

A. Yes, sir.

Q. Have you done that?

A. Yes, sir.

Q. Is your attorney with you today?

A. An attorney from my attorney's office is here.

Q. What is the name of the attorney that is with you?

A. Mr. Pearlman. I believe P-e-a-r-l-m-a-n, but I am not sure of the spelling.

Q. What legal office is he from?

A. Arnold Cohen, C-o-h-e-n.

Q. Have you then consulted with Mr. Cohen, or Mr. Pearlman?

A. I have.

Q. And Mr. Pearlman is in the ante-room now, is that correct?

A. Yes, sir.

Q. Now, on Tuesday you were directed to bring with you today the books and records of Local 269 of the International Brotherhood of Teamsters, as itemized in a subpoena duces tecum that had previously been served upon you, is that correct?

A. Yes, sir.

Q. Have you done that?

A. No, sir.

Q. You are aware of the books and records to which that subpoena referred—did you read the subpoena?

A. Yes, sir.

Q. And you know what that subpoena called for?

A. Yes, sir.

Q. Are the records for which that subpoena called in your possession?

A. No, sir.

Q. In whose possession are those records?

A. In reference to that question, I would like to consult with my attorney.

[fol. 72] The Foreman: Why?

The Witness: He is my attorney, and I guess he knows the legal status better than I do, sir.

Q. Well, I think that——

Q. Your title is now United Automotive Workers AFL-CIO, is that correct?

A. Yes, sir.

Q. Mr. Reuther—you know to whom I refer?

A. Yes, sir.

Q. Unions are now United Automotive Workers, AFL-CIO?

A. Yes, sir.

Q. Both Internationals then have an identical name?

A. Yes, sir, but there has been no name decided upon between the two of them as yet.

Q. But they have remained independent within the framework of the nationwide labor federations?

A. Yes, sir.

Q. How long did you remain at 1780 Broadway on Monday?

A. I believe I was there until maybe six, seven o'clock that night.

Q. You say that from ten a.m. approximately onward on Monday you were working at your office? Again, what are your duties as secretary-treasurer of Local 269?

[fol. 90] A. If I might add, I was tending [*sic*] to my duties as an official of Local 269 on that Monday.

Q. You were doing nothing as an official of Local 269?

A. Not on that particular day, no.

Q. What was the last day that you did do something as an official of Local 269?

A. Well, I would like to state that Local 269 is a newly chartered local.

Q. Will you just answer the question, when was the last time that you did anything as an officer of Local 269, aside from your appearance here on Tuesday?

A. I refuse to answer that question.

Q. On what grounds?

A. On the grounds that it may tend to incriminate me.

Q. Mr. Foreman, I ask that the witness be directed to answer the question.

Foreman: You are directed to answer the question, Mr. Witness.

Witness: I'm just trying to——

Q. This question is, of course, to the best of your memory. No one is trying to trap you.

A. I do not have them in my possession.

Q. I think that this Grand Jury—and I say that subject to the Foreman's consent—will at reasonable intervals afford you the opportunity to consult with your attorney; and I suggest that on this occasion, Mr. Foreman, the witness be afforded that opportunity.

A. Thank you.

(Witness leaves room, and returns.)

Q. Mr. Curcio, have you now consulted with your attorney on the question?

A. Yes, sir.

Mr. Wachtell: Will the reporter be good enough to read back the question as to which the witness requested the opportunity to consult with his attorney.

(Read by reporter: "In whose possession are those records?")

The Witness: Is that the question?

Q. Yes.

A. I am sorry. I refuse to answer that question.

Q. Upon what grounds?

A. That it may tend to incriminate me.

Q. Are you an officer of Local 269 of the International Brotherhood of Teamsters?

A. Yes, sir.

Q. What post do you hold?

A. Secretary-treasurer.

[fol. 73] Q. How long have you held that post?

A. Since about November, 1955. That is not a definite date, that is——

Q. To the best of your recollection?

A. Yes, to the best of my recollection.

Q. You have had experience in the labor movement, Mr. Curcio, prior to that date?

A. Yes, sir.

Q. You've been with other labor unions. You've been an officer of other labor unions?

A. I must beg the indulgence once again, if I may speak with my attorney.

Foreman: Have you got another question?

A. I understand that, sir. I will maintain my privilege on that particular question.

Q. Mr. Foreman, may we have the record clear. Again I ask that the privilege be overruled and the witness directed to answer.

Foreman: You are directed to answer the question, Mr. Witness.

Witness: I'll maintain my privilege.

[fol. 91] By Mr. Perrotta:

Q. I believe that you said you were served with the two subpoenas between the hours of 3 and 4 this past Monday, is that correct?

A. When you say two subpoenas, you mean the card and the paper.

Q. Yes.

A. Yes, sir.

Q. Did you get in touch with anyone after you were served with those subpoenas?

A. I tried to reach my attorney.

Q. Did you try to get in touch with John Dioguardia after you received those subpoenas?

A. I tried to reach my attorney.

Q. That's not the question I asked you.

A. I refuse to answer on the grounds it may tend to incriminate me.

Q. You know John Dioguardia?

A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Have you had conversations with John Dioguardia since this past Monday?

A. I refuse to answer on the grounds that it may tend to incriminate me.

Q. Mr. Foreman, I request that the witness be directed to answer that question.

Foreman: The last question?

Mr. Perotta: The series of questions that I put to him.

Foreman: The series of questions. Will the stenographer read off the series of questions, and I direct the witness to answer the series of questions one at a time and please ask them one at a time.

Mr. Wachtell: I do not think, Mr. Foreman, that that's a question which warrants a consultation with an attorney.

Foreman: I've already consented to it this time.

Witness: Okay.

(Witness leaves Grand Jury room, then returns.)

Q. Mr. Curcio, have you now consulted with your attorney on that question?

A. Yes, sir.

Mr. Wachtell: Would the reporter be good enough to read that question.

(Question read back: "You've been an officer of other labor unions?")

A. Yes, sir.

Q. Have you ever been secretary-treasurer of any other labor union?

A. Yes, sir.

Q. In your experience as a labor union officer, would you say that it's usually the function of the secretary-treasurer of a local to maintain custody of the books and records of the local?

A. Would you repeat that, please.

[fol. 74] Mr. Wachtell: Would you repeat the question, please.

(Question read back: "In your experience as a labor union officer, would you say that it's usually the function of the secretary-treasurer of a local to maintain custody of the books and records of the local?")

Witness: May I again speak with my attorney?

Foreman: Do you really have to?

Witness: Yes, sir.

Foreman: You really don't know who keeps the books of this union?

Witness: Yes sir, I'm speaking with attorneys here. I'm not an attorney; I'm a labor man.

Q. Mr. Curcio, I think again I can say, and with the Foreman's permission, that you're not going to be permitted to obstruct the progress of this Grand Jury investigation by attempting to consult with your attorney

on every or every other question that's asked. You have no right to consult with your attorney at all during these proceedings, and if that permission is given to you, it's given as a favor and as a privilege granted or withheld by the Grand Jury and not as a matter of right. Now, I say that to caution you——

A. Well, then, may I ask a question?

Q. —to limit your requests to such intervals when you really will feel that it's imperative for you to speak with your attorney, or else the Grand Jury may be inclined, if they feel your claims are frivolous, to deny them entirely. Do you understand that?

A. No. I would like to ask a question.

[fol. 75] Q. Mr. Curcio, you're here to be asked questions and not to ask questions.

A. I would like to know if I'm here on trial or if I'm——

Q. Mr. Curcio, you're here as a witness who has been subpoenaed before a Grand Jury. You're not here on trial. You've been asked a question—whether in your experience the secretary-treasurer of a local labor union is normally the officer who keeps custody of the books and records. Now, will you please answer that question.

A. Do you refuse to allow me to speak to my attorney?

Q. Do you, on the basis of the statement that I've made that you'll be granted possibly very limited the privilege to consult with an attorney, repeat your request to consult on this question?

A. I refuse to answer on the ground that it may tend to incriminate me.

Foreman: Why don't you answer those questions?

Witness: Why don't he allow me the courtesy to see my lawyer? These fellows are lawyers, Mr. Foreman, not me.

Foreman: Actually, all these people are out to see justice.

Witness: So am I, please believe me.

Foreman: Actually, those questions where you think there's a legal part involved that really is serious and really has something that might incriminate you, for heaven's sake, go ahead and use your attorney. They'll all support you. On these questions, for heaven's sake, anybody—these are simple questions that aren't going to incriminate. Answer these, go ahead, and anything he asks you that you think is going to incriminate——

[fol. 76] Witness: Mr. Foreman, please believe me, I want to cooperate in every way possible, but by so doing or—I don't known the terms that these fellows use, believe me. I'm not a lawyer. I've never gone to law school and I don't know the terms that they bring about.

Foreman: I think it's possible that fear plays a big part in your answers; but actually, when you analyze the question, secretary and treasurer of a union or secretary-treasurer of a corporation ordinarily has the books. All he's asked —does it in your particular case. If it doesn't——

Witness: All I asked, if I can go out and speak with my attorney. It might take me two seconds or ten.

Q. You repeat that request on this question at this time to speak with your attorney?

A. If you'll so desire it, yes.

Q. You repeat your request?

A. Yes.

Mr. Wachtell: Mr. Foreman, I suggest that the witness be allowed to speak with his attorney.

Witness: Thank you, sir.

Foreman: As [*sic*] that attorney to give you some freedom, will you, to answer some of these questions.

(Witness leaves Grand Jury room, then returns.)

Q. Mr. Curcio, have you now again consulted with your attorney?

A. Yes sir.

Q. I'll repeat the substance of the question. In your experience as an officer of labor unions, would you say that [fol. 77] it's usual for the secretary-treasurer of a local labor union to maintain custody of the books and records of the local?

A. I refuse to answer on the ground that it may tend to incriminate me.

Q. Now, you understand, Mr. Curcio, that this question does not refer to what you've done as a secretary-treasurer, but refers to what is the normal and customary usage of labor unions. Do you understand that?

A. I can't say that I can answer for any other labor union.

Q. Then you don't know what the normal usage is. Is that what you're saying?

A. No, just in answer to the statement you just made.

Q. In the past when you—withdrawn. You've said that you in the past have been an officer of other labor unions, is that correct?

A. Yes sir.

Q. Were you ever secretary-treasurer of any other labor union?

A. Yes sir.

Q. Did you, of this other labor union, have custody of the books and records?

A. I refuse to answer on the ground that it may tend to incriminate me.

Mr. Wachtell: Mr. Foreman, I do not think that this is a proper claim of privilege and would ask that the witness be directed to answer the question.

Foreman: You are directed to answer the question, Mr. Curcio.

Witness: Then I must state that I would like to talk with my attorney.

Mr. Wachtell: I would suggest that the witness be afforded that opportunity.

Foreman: All right.

[fol. 78] Witness: Thank you.

(Witness leaves Grand Jury room, then returns.)

Q. Mr. Curcio, have you again consulted with your attorney?

A. Yes sir.

Mr. Wachtell: Would the reporter be good enough to read the question which is open.

(Question read back: "Did you, of this other labor union, have custody of the books and records?")

Witness: At this time I refuse to answer and I claim my privilege.

Q. You're refusing on the privilege not to incriminate yourself?

A. Yes sir.

Mr. Wachtell: Mr. Foreman, I do not think that the question—withdrawn.

Q. Will you indicate why not answering the question—why in some way you feel this question might tend to incriminate you.

A. I just refuse to answer——

Q. You'll not——

A. —on the ground that it may tend to incriminate me.

Mr. Wachtell: Mr. Foreman, I do not think that on the basis of the record there's a basis for the interposition of the privilege. I would ask that the witness be directed to answer the question.

Foreman: You are directed to answer that question, sir.

Witness: Well, I still take the same position.

[fol. 79] Q. You refuse to answer that question?

A. On the grounds that it may incriminate me.

Q. You realize that you've been ordered to answer that question and that your claim of privilege has been overruled by this Grand Jury?

A. No, I don't realize that. Then, once again, I would like to speak to my attorney.

Q. Mr. Curcio, you were asked the question. You refused to answer it. You were directed to answer it. You requested the opportunity to speak to your attorney. You spoke to your attorney. You returned. You were again asked the question. You again refused to answer it. You were again directed to answer it, and you've already consulted with your attorney on this very issue. Do you now, realizing that you have again been directed to answer this question, that your claim of privilege has been overruled by this Grand Jury, refuse to answer?

A. When I spoke with my attorney, I didn't advise him that I'd been denied—or that I'd been ordered to answer this question or that my claim——

Mr. Wachtell: To make the issue perfectly clear, Mr. Foreman, I suggest that the witness be permitted to consult with his attorney briefly.

Foreman: All right, Mr. Curcio.

Witness: Would you repeat that again, please?

Foreman: You're directed to answer the Grand Jury.

Witness: On the question—would you read it, please, if you don't mind?

Foreman: The exact question, would you read back.

(Question read back: "Did you, of this other labor union, [fol. 80] have custody of the books and records?")

(Witness leaves Grand Jury room, then returns.)

Mr. Wachtell: If the record may note, Mr. Foreman, that the—by the clock in the Grand Jury room—the witness left the Grand Jury room at seven and a half minutes after three and returned at 12 minutes after three. The brief interval for consulting with his attorney being four and a half minutes.

Q. Mr. Curcio, have you consulted with your attorney again?

A. Yes sir.

Q. Will you now answer the question, and I ask that the question be read again.

(Question read back: "Did you, of this other labor union, have custody of the books and records?")

Witness: On the direction of the Foreman, instructing me to answer, the answer is yes.

Q. Referring to the books—withdrawn. Referring to Local 269 of the International Brotherhood of Teamsters, to your knowledge are there any books and records of this local?

A. May I make another request to see my lawyer?

Mr. Wachtell: Mr. Foreman, in view——

Witness: I assure you I won't go over the time limit. I wasn't aware of any time limit.

Foreman: Go ahead this time.

Witness: Would you read the question back, please.

[fol. 81] Q. (Question read by reporter as follows: "Q. Referring to Local 269 of the International Brotherhood of Teamsters, to your knowledge are there any books and records of this local?")

(Witness leaves room and then returns.)

Mr. Wachtell: Mr. Foreman, may the record show that the witness left the grand jury room at 15 minutes after 3 o'clock by the clock in the grand jury room and returned at 19 minutes after 3, a span of four minutes.

Q. Mr. Curcio, have you consulted with your attorney again?

A. Yes, sir.

Q. (Question read to witness as follows: "Q. Referring to Local 269 of the International Brotherhood of Teamsters, to your knowledge are there any books and records of this local?")

A. Yes, sir.

Q. Have you at any time been in custody of those books and records?

A. I refuse to answer on the grounds that it may tend to incriminate me.

Q. Now you say that the union does have books and records, is that correct?

A. To my knowledge.

Q. To your knowledge.

A. Yes.

Q. Are some of those records to your knowledge enumerated in the grand jury subpoena duces tecum that was served upon you?

A. I refuse to answer on the grounds that it might tend to incriminate me.

Q. Do you know—withdrawn. What are the books and records that the union does have?

A. I refuse to answer on the grounds that it might tend to incriminate me.

[fol. 82] Q. Now, you have said that the union does have books and records, is that correct?

A. Yes, sir.

Q. You say that you refuse to say what these books and records are?

A. On the grounds that it may tend to incriminate me.

Mr. Wachtell: Mr. Foreman, I think this is a completely improper and frivolous claim of privilege. I will ask that the witness be directed to answer the question.

The Foreman: You are directed to answer the question.

The Witness: Well, I don't know if I am taking up your time or I am annoying you people but, believe me, it is no pleasure for me to sit here either. Once again I'd like to talk to my attorney.

Mr. Wachtell: Mr. Foreman, in view of the repeated and persistent requests that have been made, the time span taken by the witness on each of these occasions, I think it is clear from this record that the witness is engaging in a course of tactics to obstruct the inquiry, and I ask that it be denied.

The Witness: I deny what the district attorney says emphatically. This is not true. But I will say again, I must repeat, I am not an attorney.

The Foreman: Do you understand the question? You admit to having books, and all he asked was a simple question.

The Witness: I admit knowing of books, Mr. Foreman. They are not in my possession.

The Foreman: You admit there were books?

The Witness: Yes, sir.

[fol. 83] The Foreman: And all he asked was what they consist of. Will you tell us what kind of books they were?

The Witness: I refuse to answer on the grounds that it may tend to incriminate me.

The Foreman: Was there a cash book, membership list book?

The Witness: Will you allow me to speak to my attorney and let him advise me?

The Foreman: No.

The Witness: I will stand on that then.

The Foreman: You are directed to answer the question, sir.

The Witness: I refuse to answer on the grounds it may tend to incriminate me.

By Mr. Wachtell:

Q. Mr. Curcio, do you understand that your claim of privilege has been overruled by the grand jury and that you have been directed to answer notwithstanding your supposed claim of privilege?

A. I understand that you won't grant me permission to speak to my attorney.

Q. Mr. Curcio, will you kindly answer the questions that are put to you and only the questions that are put to you? Do you understand that your claim of privilege has been overruled and that you have been directed to answer the question put to you, yes or no?

A. I have made a request to see my attorney.

Q. Do you understand that you have been directed to answer the question and that your request to consult with your attorney has been denied, yes or no?

A. Yes.

[fol. 84] Q. Do you nevertheless refuse to answer the question, yes or no?

A. I would still like to see my attorney.

Q. Do you refuse to answer the question at this time?

A. Without the advice of my attorney, yes.

Q. And you have previously consulted with your attorney about this very question?

A. No, sir; no, sir.

Q. You refuse to answer this question at this time, is that correct?

A. Without the advice of my attorney, yes.

Q. Mr. Curcio, have you at any time been in custody of any of the books and records of Local 269 of the Teamsters?

A. I refuse to answer on the grounds that it may tend to incriminate me.

By Mr. Perrotta:

Q. Mr. Curcio, when were you served with the two subpoenas in question?

A. I was here last Tuesday past—on a Monday afternoon at about three or four o'clock.

Q. You were served on Monday afternoon about two or three o'clock?

A. No, three or four o'clock.

Q. Were you in possession of the records of Local 269 of the International Brotherhood of Teamsters on Saturday past?

A. No, sir.

Q. Were you in possession of the records of Local 269 of

the International Brotherhood of Teamsters on Monday morning—I am speaking of the Monday on which you were served.

A. This question seems a little technical to me.

Q. Will you answer the question, please?

A. I refuse to answer on the grounds it may incriminate me.

Q. Mr. Curcio, is it not a fact that you answered my question with reference to your custody or possession of the records on Saturday past?

A. Yes, I did; yes, I did.

[fol. 85] Q. Did you obtain the custody or possession of these records since Saturday past?

A. I refuse to answer on the grounds that it may tend to incriminate me.

Q. Mr. Curcio, where were you on this past Sunday?

A. Would you really like to know?

Mr. Perrotta: Mr. Foreman, I request you to direct the witness not to be frivolous in his answers to an Assistant United States Attorney and to the grand jury.

The Foreman: You are directed to answer the question.

The Witness: I was home all day with my family, with my wife and my son and other members of my family, in my home.

Q. On Sunday past, Mr. Curcio, did you see any individual who is a member of Local 269 of the International Brotherhood of Teamsters?

A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Perrotta: Mr. Foreman, will you direct the witness to answer that question?

The Foreman: You are directed to answer the question, sir.

The Witness: I refuse to answer on the grounds that it may tend to incriminate me.

Q. Mr. Curcio, did you go to the offices of Local 269 of the International Brotherhood of Teamsters on Monday morning, on the Monday on which you were served with the subpoenas in question?

A. Yes, sir.

[fol. 86] By Mr. Wachtell:

Q. To your knowledge where are the records that Local 269 does have?

A. I refuse to answer on the grounds that it may tend to incriminate me.

Q. To your knowledge where were the records of Local 269 a week ago today?

A. I refuse to answer on the grounds that it may tend to incriminate me.

Mr. Wachtell: Mr. Foreman, I would ask that the witness be directed to answer the last question.

The Foreman: You are directed to answer the last question, Mr. Witness.

The Witness: May I speak with my attorney?

Mr. Perrotta: Mr. Foreman, might that privilege be granted?

The Foreman: Yes.

(Witness leaves room and then returns.)

Mr. Wachtell: May the record show that the witness has been absent from the grand jury room for five minutes?

Mr. Reporter, will you please read the question that is presently open?

(Question read as follows: "To your knowledge where were the records of Local 269 a week ago today?")

The Witness: I refuse to answer on the grounds that it may tend to incriminate me.

Mr. Wachtell: Mr. Foreman, I ask that the witness be directed to answer the question.

The Foreman: You are directed to answer the question, Mr. Witness.

[fol. 87] The Witness: I will assert my privilege.

(Mr. Wachtell resuming:)

Q. Mr. Curcio, where were the records of Local 269, if you know, on Saturday?

A. I refuse to answer on the grounds that it may tend to incriminate me.

Mr. Wachtell: Mr. Foreman, I ask that the witness be directed to answer the question.

The Foreman: You are directed to answer that question, Mr. Witness.

(No answer.)

Q. Mr. Curcio, you have said that you were not in possession of these records on Saturday, is that correct?

A. Yes, sir.

Q. Who was in possession of these records on Saturday?

A. I refuse to answer on the grounds that it may tend to incriminate me.

Mr. Wachtell: Mr. Foreman, I ask that the privilege be overruled and that the witness be directed to answer the question.

The Foreman: You are directed to answer the question, Mr. Witness.

The Witness: I will claim my privilege.

Q. Mr. Curcio, where were you when you were served with these subpoenas?

A. In my office.

Q. Where is your office?

A. 1780 Broadway, New York City.

Q. Is this the office of Local 269 of the Teamsters?

A. Yes, sir.

[fol. 88] Q. This was on Monday afternoon?

A. Yes, sir.

Q. How long had you been in your office?

A. Most of the day.

Q. How long had you been in your office, when did you get there?

A. I can't state exactly. I would say about ten o'clock in the morning.

Q. What were you doing there?

A. Following out my normal duties.

Q. What are your duties as secretary-treasurer of Local 269?

A. I must state that Local 269 shares an office with another local union.

Q. What local is that?

A. That's Local 649 of the United Automobile Workers, American Federation of Labor.

Q. Are you secretary-treasurer of Local 649?

A. I am the president.

Q. You are the president of Local 649?

A. Yes.

Q. Is Local 649 of the United Auto Workers affiliated with any International union?

A. Yes, sir.

Q. Any International federation?

A. With the American Federation of Labor.

Q. American Federation of Labor,—I assume you are aware, has merged with the Congress of Industrial Organizations?

A. Yes, sir.

Q. Is Local 649 affiliated with the new AFL-CIO?

A. Yes, sir.

Q. Is Local 649 Affiliated with the United Automotive Workers?

A. Yes, sir.

Q. Is the United Automotive Workers, formerly AFL, now merged with the United Auto Workers, formerly CIO?

A. I didn't follow that, sir.

[fol. 89] Q. (Read to witness as above.)

A. By that do you mean are both United Auto Workers AFL and CIO together?

Q. Yes.

A. As one International?

Q. Yes.

A. No, sir.

Q. Are there then two separate United Automotive Worker Internationals within the AFL-CIO at this time?

A. Yes.

Q. They both go by the same name?

A. Yes, sir.

Q. Is there any way to identify one from the other by name?

A. We are the United Auto Workers, American Federation of Labor, with the original charter that was issued at the start of the organizational drive in this particular industry.

(Stenographer reads:

"Q. Did you try to get in touch with John Dioguardia after you received those subpoenas?")

[fol. 92] Witness: I maintain my privilege.

Mr. Perrotta: Would you read the next question, please?

(Stenographer reads: "You know John Dioguardia?")

Witness: I maintain my privilege.

Q. Did John Dioguardia order you not to come down or, rather, order you not to produce the books and records of Local 269?

A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Have you seen John Dioguardia since Monday past?

A. I refuse to answer on the grounds it may incriminate me.

Q. Do you know John O'Rourke?

A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Mr. Foreman, may I request that the witness be directed to answer that question?

Foreman: The last one? You're directed to answer the last question, Mr. Witness. Will you repeat the last question, please?

(Stenographer reads:

"Q. Do you know John O'Rourke?")

Witness: I maintain my privilege.

Mr. Perrotta: Mr. Foreman, may I request that he be directed to answer whether or not he knows John O'Rourke?

Foreman: You are directed, Mr. Witness, to answer the question, do you know or do you not know John O'Rourke?

[fol. 93] Witness: I refuse to answer on the grounds it may tend to incriminate me.

By Mr. Wachtell:

Q. Mr. Curcio, have you ever seen any of the records of Local 269 of the Teamsters?

A. Yes.

Q. When was the last time that you saw any of these records?

A. I don't remember.

Foreman: Approximately?

Witness: I don't remember. I wouldn't like to venture a statement on it.

Q. To the best of your recollection when is the last time that you have seen any of the records of Local 269?

A. I can't say; I don't remember.

Mr. Wachtell: Mr. Foreman, I ask that the witness be directed to answer the question.

Foreman: You are directed to answer the question, Mr. Curcio.

Witness: I can't remember.

Q. Was it one year ago?

A. No, sir.

Q. Was it yesterday?

A. I can't remember.

Q. You do not know, you cannot remember whether you saw any of the records of Local 269 yesterday?

A. May I speak with my attorney, please?

Foreman: That's a pretty simple question. That's no trap.

Witness: They're leading up to something. Well, I would like to know what to do.

[fol. 94] Foreman: Did you see anything yesterday in the way of those records, really?

Witness: Yesterday, no.

Q. Did you see them Tuesday, any of the records of Local 269?

A. No.

Q. Did you see any of the records of Local 269 on Monday?

A. No.

Q. Did you see any of the records of Local 269 on Sunday?

A. No.

Q. On Saturday?

A. No.

Q. On Friday?

A. I don't remember.

Q. You don't remember whether you saw them on Friday, is that correct?

A. Yes, sir.

Q. Were you in the possession of any of the records of Local 269 this past Monday?

A. No, sir.

Q. No?

A. No, sir.

Q. Were you in custody or control of any of the records of Local 269 on Monday?

A. No, sir.

Q. Where were the records of Local 269 on Monday, if you know?

A. I refuse to answer on the grounds that it may tend to incriminate me.

Mr. Wachtell: Mr. Foreman, I ask that the witness be directed to answer this question and that the supposed claim of privilege be overruled.

Foreman: You are directed to answer.

Witness: I'll maintain my privilege.

By Mr. Perrotta:

Q. Mr. Curcio, have you said that you were not in possessions of the records on this past Monday, the day on which you were served?

A. Yes.

[fol. 95] Q. Is it part of your testimony that you did not see these records on that same day?

A. Yes, sir.

By Mr. Wachtell:

Q. Do you know who was in possession of the records of Local 269 on Monday?

A. I refuse to answer on the grounds that it may tend to incriminate me.

Mr. Wachtell: Mr. Foreman, I ask that the witness be directed to answer the question.

Foreman: You're directed to answer the question, Mr. Curcio.

Witness: I maintain my privilege.

Q. Mr. Curcio, have you seen any of the records of Local 269 today?

A. No, sir.

Q. Do you know where any of the records of Local 269 are today?

A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Wachtell: Mr. Foreman,——

Foreman: You are requested—directed to answer the question.

Witness: I maintain my privilege.

Q. Mr. Curcio, who is—withdrawn. Do you know who has any of the records of Local 269 at this time?

A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Wachtell: I ask that the witness be directed to answer the question.

[fol. 96] Foreman: You are directed to answer the question.

Witness: I maintain my privilege.

Q. Do you know where any of the records of Local 269 are at this time?

A. I refuse to answer on the grounds that it may tend to incriminate me.

Mr. Wachtell: Mr. Foreman, I ask——

Foreman: You are directed to answer the question.

Witness: I'll maintain my privilege.

Q. Mr. Curcio, you are aware that if you persist in your refusals to answer proper questions that are put to you that you may be held in contempt of this court. Do you understand that?

A. From what you tell me I do.

Q. Do you still refuse to answer these questions?

A. Yes, sir.

Q. Mr. Curcio, how many members are there in Local 269?

A. I refuse to answer that question.

The Foreman: Can you give an approximate amount?
Witness: No, sir.

Mr. Wachtell: Mr. Foreman, I ask that the witness be directed to answer the question.
Foreman: You are directed to answer the question, Mr. Curcio.
Witness: I maintain my privilege.

Q. You refuse to say how many members there are?
A. I maintain my privilege.
[fol. 97] Q. Do you know who the officers of Local 269 are?
A. I refuse to answer.
Q. On what grounds?
A. That it may tend to incriminate me.

Mr. Wachtell: Mr. Foreman, I ask that the witness be directed to answer the question.
Foreman: You're directed to answer the question, Mr. Curcio.
Witness: I maintain my privilege.
Q. You understand that you have no privilege. Do you still refuse to answer the question?
A. Yes, sir.

By Mr. Perrotta:

Q. Mr. Curcio, do you know someone by the name of James Hoffa?
A. I refuse to answer on the grounds that it may tend to incriminate me.

Mr. Perrotta: Mr. Foreman, I request that the witness be directed to answer the question.
Foreman: You are directed to answer.
Witness: I maintain my privilege.

Q. Mr. Curcio, what was the last occasion on which you had conversations with Mr. Hoffa?
A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Perrotta: Mr. Foreman, I request——
Foreman: You are directed to answer the question.

Witness: I maintain my privilege.

[fol. 98] Q. Mr. Curcio, do you know a James Hoffa who is Vice-president of the International Brotherhood of Teamsters?

A. I refuse to answer that on the grounds it may tend to incriminate me.

Q. Mr. Chairman, may I have a direction.

Foreman: You are directed to answer the question, Mr. Curcio.

Witness: May I have a little conference?

Foreman: Yes.

Witness: Thank you.

Foreman: But short.

Witness: Yes.

Witness goes out of room.

Witness returns:

Foreman: Will the stenographer please read back the last question to the witness?

(Stenographer reads: "Q. Mr. Curcio, do you know a James Hoffa who is Vice-president of the International Brotherhood of Teamsters?")

Witness: I refuse to answer on the grounds that it may tend to incriminate me.

Mr. Perrotta: Mr. Foreman, will you direct the witness to answer.

Foreman: You are directed.

Witness: I'll maintain my privilege.

Q. Mr. Curcio, approximately at what time was Local 269 formed?

A. To the best of my recollection, about November of 1955.

Q. Mr. Curcio, did you have conversations with John [fol. 99] Dioguardia with respect to the formation of Local 269?

A. I refuse to answer on the grounds that it may tend to incriminate me.

Mr. Perrotta: Mr. Foreman, may I have a direction?

Foreman: You are directed to answer the question, Mr. Curcio.

Witness: I'll maintain my right.

Q. Mr. Curcio, was John Dioguardia the one who suggested the formation of Local 269?

A. I refuse to answer on the grounds that it may tend to incriminate me.

Mr. Perrotta: May we have a direction on that, Mr. Foreman?

Foreman: You are directed.

Witness: I maintain my privilege.

Q. Mr. Curcio, is this your signature on this photostat that I show you—first, may I have it marked as Grand Jury Exhibit 3. (So marked). Mr. Curcio, I show you Grand Jury Exhibit 3 and I ask you, sir, if that is your signature on the letter, which is Grand Jury Exhibit 3?

A. It looks like it.

Q. Mr. Curcio, on the lower left hand of grand jury Exhibit 3, first page, appear two sets of initials: JC in caps, a diagonal mark and then in caps also the initials MW. I ask you, Mr. Curcio, who is MW?

A. My secretary; name is Mrs. Mildred Warsauer. I believe that's the correct spelling.

Q. Miss or Mrs.?

A. Mrs.

Q. How long has Mrs. Warsauer been your secretary?

[fol. 100] A. Well, she's not my secretary. I guess I used the wrong phrase. She's a girl that works in my office.

Q. Is that the office at 1780 Broadway?

A. That's right.

Q. Does she receive a salary?

A. Yes, sir.

Q. Does she receive a salary from Local 269?

A. No, sir.

Q. Does she receive a salary from Local 649?

A. Yes, sir.

Q. Does she do secretarial work for Local 269?

A. Yes—excuse me?

Q. Does she do secretarial work for Local 269?

Foreman: Full time or part time, at any time?

Witness: She draws no salary from Local 269.

Q. Does she do any work for Local 269?

A. Let me say this. If I had asked her to write a letter for me, she would.

Q. When you say "for you", do you mean for Local 269?

A. Yes, sir.

Q. Well, then, on occasion she would do work for Local 269?

A. That's right.

Q. Does Local 269 have any—a paid stenographer of its own?

A. No, sir.

Q. Does Local 269 have any paid employees?

A. No, sir.

Q. Do you draw a salary from Local 269 as Secretary-Treasurer?

A. No, sir.

Q. Do any of the officers of Local 269 draw salaries?

A. No, sir.

Q. Does Local 269 have any payroll?

A. No, sir.

Q. Does Local 269 collect any dues from members?

A. I refuse to answer that question.

[fol. 101] Mr. Perrotta: Mr. Foreman, I ask that the witness be directed to answer the question.

Foreman: You're directed to answer the question.

Witness: I'll maintain my privilege.

Q. Does Local 269 have a bank account?

A. I refuse to answer that on the ground it may incriminate me.

Mr. Perrotta: Mr. Foreman, I ask that the witness be directed to answer the question.

Foreman: You are directed to answer the question, Mr. Curcio.

Witness: I'll maintain my privilege.

Q. Where was Grand Jury Exhibit—withdrawn. Where was the original of Grand Jury Exhibit 3, the photostats, typed, if you know?

A. At my office.

Q. 1780 Broadway?

A. Right.

Q. How many typewriters do you have at that office?

A. I would say two.

Q. Mr. Curcio, I show you Grand Jury Exhibit 3 again and ask you to note that this letter is on a letterhead of Local 269, is that correct?

A. Yes, sir.

Q. Have you seen other pieces of paper printed bearing that captioned heading, letterhead?

A. Yes, sir.

Q. Did you order the printing of those letterheads?

A. Yes, sir.

Q. When?

A. I should say back in November or December.

Q. What printer did you order those letterheads from?

A. I refuse to answer that question.

[fol. 102] Q. On what grounds?

A. May I have a short conference, please?

Mr. Perrotta: Mr. Foreman, I request that this request be denied?

Witness: I just want to make it certain for myself.

Foreman: That's a simple question.

Witness: Just let me check it a second.

Foreman: Hurry up back; make it short.

(Witness goes out of room.)

(Witness returns.)

Q. Mr. Curcio, have you again consulted with your attorney? I believe it is over five minutes since you left the Grand Jury room.

A. Yes, sir.

Mr. Wachtell: May we have the last question that is open, read, please.

(Read by reporter MTC: "What printer did you order those letterheads from?")

The Witness: I believe they go under the name of Daniel Press.

Q. Where is Daniel Press?

A. They are in New York City. I don't know the exact address.

Q. Where, to the best of your knowledge, is their location?

A. Downtown somewhere, I believe.

Q. Where?

A. I don't know; it is in the city.

Q. Did you go there in person, or did you 'phone them?

A. A telephone call.

Q. At the time—withdrawn—how many letterheads did [fol. 103] you at that time order for Local 269?

A. I believe about five hundred.

Q. Have you ever ordered more since that time?

A. No, sir.

Q. At the time that you ordered these letterheads for Local 269, did you order any other stationery of Daniel Press?

A. The necessary stationery that is used in a local union.

Q. Envelopes?

A. Envelopes.

Q. Other stationery for Local 269?

A. Yes, sir.

Q. Did you order any stationery for any organization other than Local 269?

A. Maybe for 649; I just don't remember.

Q. Did you order any stationery for any organizations other than Locals 269 and 649?

A. Not to my knowledge.

Q. Did you order any stationery for Local 284 of the International Brotherhood of Teamsters?

A. Not to my knowledge.

Q. Have you at any time ordered any stationery for Local 284?

A. Not to my knowledge.

Q. Did you at that time, referring to your ordering of stationery for Local 269, order any stationery for Local 258 of the Teamsters?

A. Not to my knowledge.

Q. Have you ever ordered any stationery for Local 258?

A. Not my knowledge.

Q. Did you at that time order any stationery for Local 651 of the Teamsters?

A. Not to my knowledge.

Q. Well, you know whether you did or not, to all of these questions.

A. Not to my knowledge.

Q. Does that mean "No"?

A. That is what I mean, not to my knowledge.

Q. You would know if you did order stationery?

[fol. 104] A. I don't know. I don't think it would be that important for me to remember anything like that. First of all, 269 is a newly chartered local, that just got started, and I sent in an order to a stationer.

Q. Is it your answer that you do not remember whether you also ordered stationery for Local 258, Local 651—is that your answer?

A. Not to my knowledge.

Q. Are you saying that you do not remember?

A. I am saying not to my knowledge.

Q. Does that mean "No"?

A. I can only put it the way I know, sir; and that is, not to my knowledge.

Q. Mr. Curcio, there are three answers you can give to these questions: "Yes," "No" or you "don't remember". Now, I will repeat the question:

Have you ordered any stationery for Local 258? Will you please give one of those three answers.

A. I don't remember.

Q. Have you at any time ordered any stationery for Local 651 of the Teamsters?

A. I don't remember.

Q. Have you at any time ordered any stationery for Local 362 of the Teamsters?

A. I don't remember.

Q. Do you know a man named Armondo, A-r-m-o-n-d-o, Simontacci, S-i-m-o-n-t-a-c-c-i?

A. I refuse to answer that question on the grounds that it might tend to incriminate me.

Mr. Wachtell: Mr. Foreman, I ask a direction.

The Foreman: You are directed to answer that question.

The Witness: I maintain my privilege.

[fol. 105] Q. Do you know a man named Basil, B-a-s-i-l, Koschel, K-o-s-c-h-e-l?

A. I refuse to answer on the ground that it may tend to incriminate me.

Mr. Wachtell: I ask a direction.

The Foreman: You are directed to answer the question.

The Witness: I maintain my privilege.

Q. Do you know a man named Philip, P-h-i-l-i-p Kazansky, K-a-z-a-n-s-k-y?

A. I refuse to answer on the ground it may tend to incriminate me.

The Foreman: You are directed to answer that question.

The Witness: I maintain my privilege

Q. Do you know a man named Frank Easton, E-a-s-t-o-n?

A. I refuse to answer on the grounds it may tend to incriminate me.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Do you know a man named John Korsizor, K-o-r-s-i-z-o-r?

A. I refuse to answer on the grounds it may tend to incriminate me.

The Foreman: You are directed to answer that question, Mr. Curcio.

The Witness: I maintain my privilege.

[fol. 106] Do you know a man named Rosario, R-o-s-a-r-i-o Catalano, C-a-t-a-l-a-n-o?

A. I refuse to answer on the grounds it may tend to incriminate me.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Do you know the identity of any of the officers, other than yourself, of Local 269?

A. I refuse to answer on the grounds it may tend to incriminate me.

Mr. Wachtell: I ask a direction.

The Foreman: You are directed to answer that question, Mr. Curcio.

The Witness: I maintain my privilege.

By Mr. Perrotta:

Q. Mr. Curcio, I have one last question: Will you give us the names of the people, other than Mr. Pearlman, who accompanied you here today?

A. Mr. Arnold Cohen, who is my legal counsel.

Q. And the other names?

A. I don't know the other fellow. He is a friend of Mr. Cohen, I believe.

Q. Thank you, sir.

Mr. Perrotta: Mr. Foreman, would you direct that the witness be required to return on Tuesday, at two-fifteen.

The Foreman: You are directed to return, Mr. Curcio, next Tuesday, here, the same room, at two fifteen.

[fol. 107] The Witness: Do I report to the room downstairs or come right here?

Mr. Wachtell: The witness is to report to the ante-room outside of this Grand Jury room.

The Witness: Thank you.

(Witness excused)

April 17, 1956.

Joseph Curcio, residing at 137-45 70th Road, Flushing, New York, after having been first duly sworn by the Foreman, testified as follows:

By Mr. Wachtell:

Q. Mr. Curcio, you appeared before this Grand Jury on Thursday; is that correct, April 10th?

A. Yes, sir.

Q. Is your lawyer with you today?

A. Yes, sir.

Q. What is his name?

A. Mr. Arnold Cohen.

Q. I am going to ask you some questions, including some that were put to you on Thursday which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records?

The Witness: I would like to make a statement if I may at this time.

Mr. Wachtell: Mr. Curcio, will you please answer the question that was put to you.

[fol. 108] The Witness: May I make this statement?

Mr. Christy: No, you cannot make any statement here in the Grand Jury.

The Witness: No statement?

Mr. Christy: No statement. You will be required to answer the question. Do you wish the question repeated?

The Witness: May I, please?

Mr. Wachtell: Would the reporter read back the question which is open.

(Whereupon the reporter read the question.)

The Witness: May I be refreshed as to what my answer was on Thursday?

Mr. Wachtell: Yes. On Thursday you first refused to answer that question on the grounds that you felt it might tend to incriminate you. Subsequently, you said that you had not been in custody of those books and records on Monday, a week ago yesterday.

The Witness: I had refused to answer the question on Thursday and I refuse to answer it now.

The Foreman: You are directed to answer the question.

The Witness: I maintain my privilege.

By Mr. Wachtell:

Q. Mr. Curcio, have you ever had possession of the books and records of this local?

The Witness: I refuse to answer that question.

The Foreman: You are directed to answer it, Mr. Curcio.

[fol. 109] The Witness: I maintain my privilege.

Q. Did you have custody and control of these records last Thursday?

The Witness: I refuse to answer that question.

The Foreman: You are directed to answer, Mr. Curcio.

The Witness: I maintain my privilge.

Q. Do you have possession of those records or any of them today?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Do you have custody and control of any of those records today?

The Witness: I refuse to answer.

The Foreman: You are directed to answer, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Where are any of those records today, if you know?

The Witness: I refuse to answer.

The Foreman: You are directed to answer, Mr. Curcio.

The Witness: I maintain my privilege.

[fol. 110] Q. Who has any of those records today, if you know?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Where were any of these records or all of these records a week ago Thursday?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Where were any or all of these records a week ago Saturday?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Where were any or all of these records a week ago yesterday, Monday?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Where were any or all of these records this past Thursday?

[fol. 111] The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Where are any or all of these records today?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Who, if you know, had any or all of these records a week ago Saturday?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Who had any or all of these records a week ago yesterday?

The Witness: I refuse to answer.

The Foreman: You are directed to answer the question, Mr. Curcio.

The Witness: I maintain my privilege.

Q. Who has any or all of these records today?

The Witness: I refuse to answer.

The Foreman: You are directed to answer that question, Mr. Curcio.

[fol. 112] The Witness: I maintain my privilege.

Mr. Wachtell: Mr. Foreman, would you excuse the witness and direct him to remain in the waiting room.

(The Foreman so directed the witness and the witness left the room.)

(The Grand Jury adjourned to Courtroom 318.)

JOSEPH CURCIO, recalled to the stand, continued:

By Mr. Wachtell:

Mr. Wachtell: Would you be good enough to read the first of the questions which the witness has been directed to answer by Judge Noonan?

(The reporter read the question as follows: "Q. I am going to ask you some questions, including some that were put to you on Thursday which you declined to answer.

Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records?")

The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

Mr. Wachtell: Mr. Reporter, would you please read the next question?

(The reporter read the question as follows: "Q. Mr. Curcio, have you ever had possession of the books and records of this local?")

[fol. 113] The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

Mr. Wachtell: The next question, please, Mr. Reporter.

(The reporter read the question as follows: "Q. Did you have custody and control of these records last Thursday?")

The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

Mr. Wachtell: The next question, please, Mr. Reporter.

(The reporter read the question as follows: "Q. Do you have possession of those records or any of them today?")

The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

Mr. Wachtell: The next question, please.

(The reporter read the question as follows: "Q. Do you have custody and control of any of those records today?")

The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

Mr. Wachtell: The next question, please.

(The reporter read the question as follows: "Q. Where are any of those records today, if you know?")

The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

Mr. Wachtell: The next question, please.

(The reporter read the question as follows: "Q. Who has any of those records today, if you know?")

[fol. 114] The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

Mr. Wachtell: The next question, please.

(The reporter read the next question as follows: "Q. Where were any of these records or all of these records a week ago Thursday?")

The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

Mr. Wachtell: The next question, please.

(The reporter read the question as follows: "Q. Where were any or all of these records a week ago Saturday?")

The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

Mr. Wachtell: The next question, please.

(The reporter read the question as follows: "Q. Where were any or all of these records a week ago yesterday, Monday?")

The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

Mr. Wachtell: The next question, please.

(The reporter read the question as follows: "Q. Where were any or all of these records this past Thursday?")

The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

Mr. Wachtell: The next question, please.

(The reporter read the question as follows: "Q. Where are any or all these records today?")

The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

Mr. Wachtell: The next question, please.

[fol. 115] (The reporter read the question as follows: "Q. Who, if you know, had any or all of these records a week ago Saturday?")

The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

Mr. Wachtell: The next question, please.

(The reporter read the question as follows: "Q. Who had any or all of these records a week ago yesterday?")

The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

Mr. Wachtell: The next question, please.

(The reporter read the question as follows: "Q. Who has any or all of these records today?")

The Witness: I refuse to answer, on the grounds that it may tend to incriminate me.

By Mr. Wachtell:

Q. Mr. Curcio, in the interim period between the time of your leaving the courtroom where you were directed to answer these questions by the Judge, between your coming back into this Grand Jury Room, did you consult with your counsel?

A. Yes, sir.

Mr. Wachtell: Mr. Foreman, I suggest that the witness be excused temporarily and directed to remain in the anteroom.

The Foreman: You are excused temporarily and directed to wait outside, Mr. Curcio.

(Whereupon the witness was temporarily excused.)

[fol. 116] JOSEPH CURCIO, recalled to the stand.

The Foreman: Mr. Curcio, you are directed to be here at 2:00 o'clock, Thursday, this week, same place.

The Witness: Yes, sir.

(Whereupon the witness was excused.)

(The Grand Jury adjourned at 4:30 p.m. until Thursday, April 19, 1956, at 2:15 p.m.)

[fol. 117] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JOSEPH CURCIO, Defendant

C150-62

ORDER MAKING GRAND JURY MINUTES PART OF RECORD—May 9, 1956

Joseph Curcio, having been subpoenaed to appear before the Grand Jury for the Southern District of New York, and having so appeared and testified on April 10, April 12, and April 17, 1956, and having refused to answer certain questions, and having been adjudged in contempt of court and committed to the custody of the United States Marshal for a period of six months pursuant to order of this Court signed by the Honorable Gregory F. Noonan dated April 19, 1956, and said Joseph Curcio having served and filed his notice of appeal dated April 20, 1956, and

Arnold Cohen, Esq., attorney for appellant Joseph Curico, and Paul W. Williams, United States Attorney for the Southern District of New York, for the United States of America, being agreed, subject to the order of this Court, that a copy of the minutes of the Grand Jury testi-[fol. 118] mony of the witness Joseph Curcio on April 10, 12 and 17, 1956, should be released and filed in this action, to be deemed part of the record on appeal, and

Sufficient cause, therefore, appearing why these minutes should be so released and filed,

Now, therefore, on motion of the United States Attorney, it is

Ordered, that a copy of the minutes of the testimony of Joseph Curcio before the Grand Jury on April 10, 12 and

17, 1956 be released and filed in this action and be deemed part of the record on appeal.

Dated: New York, N. Y., May 9th, 1956.

(S.) Gregory F. Noonan, U. S. D. J.

Consented to:

(S.) Paul W. Williams, United States Attorney.

Consented to:

(S.) Arnold Cohen by Herbert A. Simon.

Filed 5-10-56.

[fol. 119] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1955

No. 385

Argued May 14 and 15, 1956 Decided June 5, 1956

Docket No. 24105

UNITED STATES OF AMERICA, Appellee,

v.

JOSEPH CURCIO, Defendant-Appellant

Before: MEDINA, LUMBARD and WATERMAN, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Gregory F. Noonan, Judge.

Defendant appeals from an order adjudging him in contempt for refusal to answer certain questions propounded to him by the District Judge before a Grand Jury. Affirmed.

Paul W. Williams, United States Attorney for the Southern District of New York, New York City (Arthur H. Christy, Herbert M. Wachtell, Fioravante G. Perrotta [fol. 120] and Charles H. Miller, Assistant United States Attorneys, New York City, of Counsel), for appellee.

Arnold Cohen, New York City (Samuel Mozansky and Arnold Cohen, New York City, of Counsel), for appellant.

OPINION—June 5, 1956

MEDINA, Circuit Judge:

On March 29, 1956, a Special Grand Jury was impanelled in the Southern District of New York to investigate charges of racketeering in the garment and trucking industries. Appellant, Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters, having been duly served with a personal subpoena, and a subpoena *duces tecum* calling for the production of certain books and records of the union, failed to produce the books and records and refused to answer questions as to their whereabouts, claiming an alleged privilege under the Fifth Amendment and asserting that answers to the questions might tend to incriminate him. For such refusal he was adjudged guilty of a criminal contempt, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, and sentenced to imprisonment for six months, unless he sooner purged himself by answering the questions. From the order containing such adjudication and commitment defendant appeals.

On his first appearance before the Grand Jury on Tuesday, April 10, 1956, in response to the subpoenas appellant refused to answer any questions whatever, stating that he had not consulted a lawyer and that he would not testify until he had done so. The matter was put over to Thursday, April 12, 1956, when appellant arrived with his counsel, who remained in the anteroom of the Grand Jury during the time of appellant's interrogation. The full rec- [fol. 121] ord of what occurred has been released and is on file but is not a part of the record before us. It does appear, however, that appellant was determined to give no information whatever concerning the whereabouts of the books and records, although he readily admitted that there were such books and records and that he was Secretary-Treasurer of Local 269. He did testify that these books and records were not in his possession either at the time of the service of the subpoena *duces tecum* (Monday, April 9), or at the time of his appearance before the Grand Jury (Thursday, April 12).

Accordingly, on April 17, the Assistant United States Attorney in charge of the interrogation of Curcio brought the matter of his recalcitrance before the District Judge

for a determination of whether or not the Fifth Amendment plea should be sustained or overruled. The court reporter who had been present before the Grand Jury identified his stenotype tape of some fifteen questions addressed to appellant relative to the whereabouts of the books and records and his refusals to answer any of them. Appellant's counsel was present. His first move was to request that "the witness be furnished with a copy once the minutes are transcribed of the questions which are the subject in issue at the present time." The reporter then testified at length to the record of what occurred before the Grand Jury, giving the text of the fifteen questions and whatever was said in reference thereto by appellant, by the foreman of the Grand Jury and by the Assistant United States Attorney conducting the examination of appellant.

The questions were:

Q. I am going to ask you some questions, including some that were put to you on Thursday which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of [fol. 122] Teamsters, have you at any time been in custody of those books and records?

Q. Mr. Curcio, have you ever had possession of the books and records of this local?

Q. Did you have custody and control of these records last Thursday?

Q. Do you have possession of those records or any of them today?

Q. Do you have custody and control of any of those records today?

Q. Where are any of those records today, if you know?

Q. Who has any of those records today, if you know?

Q. Where were any of these records or all of these records a week ago Thursday?

Q. Where were any or all of these records a week ago Saturday?

Q. Where were any or all of these records a week ago yesterday, Monday?

Q. Where were any or all of these records this past Thursday?

Q. Where are any or all of these records today?

Q. Who, if you know, had any or all of these records a week ago Saturday?

Q. Who had any or all of these records a week ago yesterday?

Q. Who had any or all of these records today?

There was extended argument, principally by appellant's counsel, on the subject of whether or not there was any plausible basis for appellant's claim that answers to the questions might tend to incriminate him. The principal contention was:

> I am telling the Court in good conscience that he is asserting the Fifth Amendment because in his mind [fol. 123] there is some doubt as to whether or not any of these answers might incriminate him by conspiracy, by association, or by any other subsequent action that the United States Attorney's office might start.

Reference was also made in a vague way to a civil litigation "going on on the 15th floor," which was a trial of a controversy between Martin T. Lacey and John J. O'Rourke over an election to the presidency of the Teamsters Joint Council. Lacey had charged that O'Rourke and his adherents, or some of them, were mixed up with gangsters and racketeers. Some photostats of newspaper clippings relating to the Lacey-O'Rourke controversy and also to a so-called drive against "city rackets" by the federal and local prosecutors, are contained in appellant's Appendix. But, so far as we can make out, there is nothing in the record before us to indicate that appellant is connected with or suspected of being connected with any crime.

At the close of an extended argument the court directed appellant to answer each of the fifteen questions and the Assistant United States Attorney stated "for the record" that there were other questions, not relating to the books and records, which appellant had refused to answer and, with the approval of the court, these were reserved for "some future date," should the government desire rulings thereon. No objection to this procedure was made by ap-

pellant's counsel who merely requested an opportunity to consult with his client before appellant returned to the Grand Jury room; and this request was granted.

On April 19, 1956, appellant returned to the Grand Jury and persisted in his refusal to answer any of the questions pertaining to the whereabouts of the books and records. Appellant was brought before the court and, after some further argument to which reference will be made shortly, the Court in the presence of the Grand Jury directed ap- [fol. 124] pellant again to answer the questions. Upon his refusal to do so he was adjudged in contempt.

Appellant claims that he was not afforded a hearing as required by law, that he was not furnished with a full copy of the minutes of the Grand Jury proceedings during his interrogation on April 10 and April 12, and that he was justified in refusing to answer the questions.

We find no defect in the procedure followed here, which follows the pattern long in vogue in this Circuit. See *United States* v. *Trock*, 2 Cir., —— F. 2d ——, decided April 9, 1956. Appellant did have a full and fair hearing on April 17. The subject matter of this hearing was the exercise of his alleged constitutional right under the Fifth Amendment. Both appellant and his counsel were afforded every opportunity to produce any evidence, by appellant or by others, which might tend to show that there was a plausible basis for the claim of privilege. But nothing was said about any witnesses nor can we find any basis whatever for appellant's alleged fear that he may be "trapped," as he expressed it.

The requests for "a list of specifications," for a transcript of the testimony of appellant before the Grand Jury on April 12, and for "a reasonable time to prepare the defense" and "have it supported by witnesses or any other documents that I may feel are relevant or material to the defense of contempt in a contempt proceeding," were all made on April 19, after appellant had again refused to answer the questions. These demands were evidently based upon a misconception of the function of the proceedings which had already taken place on April 17, or they constituted a last ditch effort to delay the proceedings. There is no indication as to who the witnesses were or what would

be the subject of their testimony. Perhaps counsel did not anticipate that the court would without further ado, [fol. 125] and in the presence of the Grand Jury, himself put the questions to the witness and direct him to answer. But that is what took place; and the refusals to answer thus clearly constituted a criminal contempt "in the actual presence of the court," to be punished summarily, as provided in Rule 42(a) of the Federal Rules of Criminal Procedure. No hearing on this phase of the matter was required or necessary; nor could a hearing have served any useful purpose.

Nothing to the contrary was held by the First Circuit in *Carlson* v. *United States*, 209 F. 2d 209 or in *Hooley* v. *United States*, 209 F. 2d 219. Had the Grand Jury merely cited or presented appellant to the court, for his refusals before the Grand Jury to answer questions in accordance with the prior directions of the Court, an entirely different situation would have been presented. Had that been the case here the contempt would not have been committed "in the actual presence of the court."

Nor do appellant's contentions find support in *United States* v. *Zwillman*, 2 Cir., 108 F. 2d 802. That was also a case where the alleged contempt had been committed in the presence of the Grand Jury, not in the presence of the court. At the hearing which covered the entire matter, including such argument or evidence as had relevancy to defendant's claim of privilege under the Fifth Amendment, counsel asserted that a scrutiny of the Grand Jury minutes of defendant's interrogation would reveal the fact that he had been engaged in the liquor business before the repeal of the Eighteenth Amendment, and he also proffered witnesses on the subject. As the questions which Zwillman refused to answer sought to elicit the names of his business associates in the years 1928 to 1932, it was held that there had been a curtailment of his right to "show that he was likely to be endangered by answering," and the [fol. 126] contempt adjudication was reversed. Here the very contrary appears. There was a hearing at which appellant was given the fullest opportunity to "show that he was likely to be endangered by answering," and he failed to do so. At the hearing on April 17 there was no intima-

tion that anything said by appellant in his so-called testimony before the Grand Jury on April 12 had any bearing on his refusals to answer the questions concerning the whereabouts of the books and records, nor was any such suggestion made at any time. Appellant was in constant consultation with his counsel during the entire period of his appearance before the Grand Jury on April 12, and it is reasonable to suppose that counsel would have directed the attention of the court to any part of such interrogation which might be claimed to support the alleged privilege, as was done in the *Zwillman* case. Mere vague and belated demands such as we have in this record are plainly insufficient.

It should be unnecessary to add that counsel's suggestion, just before the court propounded the questions to appellant for the last time, that he inform the court confidentially, and in the absence of the Grand Jury, of "exactly what is in my mind, and most likely in my client's mind," added nothing of significance to the record.

On the merits we think the case too clear for reasonable debate. In *United States* v. *White*, 322 U.S. 694, the Supreme Court refused to recognize a claim of privilege asserted by a labor union official with respect to certain records of the union in his possession because, as the Court stated at page 699:

> (T)he official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even [fol. 127] though production of the papers might tend to incriminate them personally.

This requirement to produce would be no more than an empty and meaningless form of words if the lawful custodian of the records could hand over possession to another and then refuse to say when or where he had last seen them on the ground that any testimony on the subject would tend to incriminate him. To sustain the privilege here asserted would provide an easy method by which any investigation could be hamstrung from the start.

Although there is nothing before us to show that ap-

pellant has had any dealings with racketeers or extortionists, we may assume that Local 269 is in some way involved in the controversy between Lacey and O'Rourke and that he has or has had some contact with O'Rourke, who, we are told, has been charged with seeking the presidency of the Teamsters Joint Council through the acts of gangsters and racketeers. We are nevertheless at a loss to see how appellant's answers to any of the fifteen questions here propounded can have any tendency to incriminate him. It is said that he has a criminal record. But what of that? We are not informed of the nature of the charge upon which he was convicted nor of the date thereof; nor have we any reason to suppose that there is any connection between the whereabouts of the books and records of Local 269 and the crime or crimes which appellant is said to have committed.

It seems to be supposed by counsel that notorious criminals, racketeers and unsavory characters generally have an open sesame to the privilege guaranteed by the Fifth Amendment. But we can draw no such inference from the rulings made in *Hoffman* v. *United States*, 341 U. S. 479 and *United States* v. *Doto*, 2 Cir., 205 F. 2d 416, strongly [fol. 128] relied upon by appellant. It is not the general reputation or criminal record of the witness which controls but rather the circumstances of each particular case. The constitutional rights of the so-called "little fellow" are entitled to no less protection than are the rights of those who pursue a career of crime in the grand manner. The test is whether or not on the record before the court defendant has made a showing "that he was likely to be endangered by answering the questions." *United States* v. *Zwillman, supra*. We can find no such showing here.

United States v. *Trock*, —— F. 2d ——, decided by this Court on April 9, 1956, is especially urged upon us as in some way supporting appellant's contentions. But there is no similarity whatever between the two cases. In that case there was an insufficient showing of peril to the witness: here there is no showing whatever. Mere atmosphere will not suffice.

Affirmed.

[fol. 129] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of June one thousand nine hundred and fifty-six.

Present: Hon. Harold R. Medina, Hon. J. Edward Lumbard, Hon. Sterry R. Waterman, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

JOSEPH CURCIO, Defendant-Appellant

JUDGMENT—June 5, 1956

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fols. 130-133] [File endorsement omitted]

[fols. 134-135] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING REHEARING AND GRANTING STAY OF MANDATE—June 22, 1956

A petition for rehearing and to stay the issuance of the mandate for thirty (30) days pending the filing of a petition for a writ of certiorari to the Supreme Court of the

United States having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and it hereby is denied.

Further ordered that the issuance of the mandate be and it hereby is stayed.

A. Daniel Fusaro, Clerk.

[fol .136] (Clerk's Certificate to foregoing transcript omitted in printing.)

[fol. 137] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1956

No. 260

JOSEPH CURCIO, Petitioner

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed October 8, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court, U.S.
FILED
JUL 1
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 260

JOSEPH CURCIO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL MEZANSKY,
Attorney for Petitioner,
Office & P. O. Address,
350 Fifth Avenue,
New York 1, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1956

No. .....

JOSEPH CURCIO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Joseph Curcio prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 5, 1956.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. This opinion is printed in Appendix A hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on June 5, 1956. Rehearing was denied on June 22, 1956, but

a stay of the mandate was granted. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

I.

Whether petitioner was denied, in a proceeding under Rule 42(a) of the Federal Rules of Criminal Procedure, the right to a hearing and to an adequate and reasonable opportunity to be heard and to introduce evidence that might demonstrate that his answers to questions put to him by the Court in the presence of the Grand Jury would incriminate him.

II.

Whether petitioner could be put in contempt for his failure to answer questions directed to be answered by the Court in the presence of the Grand Jury, so long as it denied to the petitioner a complete transcript of the Grand Jury testimony, for the purpose of demonstrating that the 15 questions chosen as the basis for the contempt proceeding were part of a series of other questions which were obviously incriminatory in nature.

III.

Whether the Court properly overruled the exercise by the petitioner of his privilege under the Fifth Amendment to the Constitution, in view of the implications of the questions asked the petitioner by the Court in the presence

of the Grand Jury and the setting in which these questions were asked."

Constitutional Provisions, Statute and Rule Involved

1. UNITED STATES CONSTITUTION, AMENDMENT V.:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. TITLE 18, UNITED STATES CODE, SECTION 401:

Power of Court.

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

3. RULE 42, FEDERAL RULES OF CRIMINAL PROCEDURE:

"(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt, except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Statement

On March 29, 1956, a special Grand Jury was impanelled in the Southern District of New York by District Judge Archie O. Dawson to investigate allegations of racketeer-

ing in the garment and trucking industries. (New York Times, March 7, 1956 (A.A. 52)*.) This was the aftermath of wide-spread public charges that seven local unions were recently chartered by the International Brotherhood of Teamsters to gain control of the Teamsters Joint Council and that these local unions were controlled by well-known gangsters, ex-convicts and labor racketeers, particularly one John DiGuardi, alias, "Johnny Dio". (New York Post, January 25, 1956; New York Times, March 14, 1956; New York Times, March 16, 1956; New York Times, March 23, 1956 (A.A. 51-57).)

During this period, the public press gave wide publicity also to a civil action in which these charges were repeated and which was commenced in the United States District Court for the Southern District of New York, by Martin T. Lacey, President of the Teamsters Joint Council.

United States District Judge Noonan, who directed the petitioner to answer questions in the presence of the Grand Jury, had granted a temporary restraining order in that civil action and was therefore fully familiar with the charges that were made in that civil action. (New York Times, March 23, 1956 (A.A. 55).)

The wide publicity given to these charges of racketeering in the trucking industry included press releases indicating that Mr. Christy, who was one of the Assistant United States Attorneys in the present case, had conferred with Mr. Lacey in respect to his charges (A.A. 56).

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* The symbol "A.A." refers to Appellant's Appendix which was part of the record in the Court below and which accompanies this petition.

In the examination of the prospective grand jurors for the Grand Jury investigation, the United States Attorney asked the jurors whether they were acquainted with John DiGuardi, who was identified as a labor racketeer and extortionist. (New York Times, March 30, 1956 (A.A. 56).)

It was in this setting that the petitioner, Joseph Curcio, Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters, was served with two subpoenas for his appearance before the Grand Jury on April 10, 1956, and for the production of certain books and records of the union (A.A. 47-50). The subpoenas which directed the appearance of the petitioner stated that the petitioner's testimony was to be taken "to testify all and everything which you may know in regard to an alleged violation of Section 371, Title 18 U. S. C., on the part of the United States * * *." Local 269, of which the petitioner was Secretary-Treasurer, was one of the seven local unions alleged to have been chartered for the purpose of controlling the election of the Presidency of the Teamsters Joint Council and the newspapers carried reports that this union was allegedly controlled and run by labor racketeers and gangsters.

The petitioner appeared before the Grand Jury on April 10, 1956 and refused to answer questions on the ground, as he stated at the time, "you are throwing legal stuff here and I don't know whether you are trapping me or not" (G.A.* 6a). The petitioner was directed to return again on April 12, 1956. The petitioner admitted that he

* The symbol "G.A." refers to the Government's Appendix filed in the Court below and accompanies this petition.

was the Secretary-Treasurer of Local 269, but denied that the books and records of this union were in his possession either at the time of the service of the subpoena duces tecum (Monday, April 9, 1956) or at the time of his appearance before the Grand Jury (Thursday, April 12, 1956).

The transcript of the testimony taken before the Grand Jury on April 12, 1956, and which was not furnished to petitioner's attorney until after the petitioner was found guilty of contempt, shows that petitioner was asked a total of approximately 225 questions. Although this transcript was not furnished to the attorney for the petitioner until after the petitioner was found guilty of contempt, the entire transcript was printed as the Government's Appendix and was made part of the record in the Court below.

An examination of this transcript indicates that from some of the questions asked the petitioner, there was an implication that petitioner was being charged with a conspiracy with John DioGuardia, identified as an ex-convict and labor racketeer, in the public press to obstruct justice. These questions were (G.A. 29a):

"By Mr. Perrotta:

Q. I believe that you said you were served with the two subpoenas between the hours of 3 and 4 this past Monday, is that correct? A. When you say two subpoenas, you mean the card and the paper?

Q. Yes. A. Yes, sir.

Q. Did you get in touch with anyone after you were served with those subpoenas? A. I tried to reach my attorney.

Q. That's not the question I asked you. A. I refuse to answer on the grounds it may tend to incriminate me.

Q. You know John Dioguardia? A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Have you had conversations with John Dioguardia since this past Monday? A. I refuse to answer on the grounds that it may tend to incriminate me.

Q. Mr. Foreman, I request that the witness be directed to answer that question.

Foreman: The last question?

Mr. Perrotta: The series of questions that I put to him.

Foreman: The series of questions. Will the stenographer read off the series of questions, and I direct the witness to answer the series of questions one at a time and please ask them one at a time.

(Stenographer reads: 'Q. Did you try to get in touch with John Dioguardia after you received those subpoenas?')

Witness: I maintain my privilege.

Mr. Perrotta: Would you read the next question, please?

(Stenographer reads: 'Q. You know John Dioguardia?')

Witness: I maintain my privilege.

Q. Did John Dioguardia order you not to come down or, rather, order you not to produce the books and records of Local 269? A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Have you seen John Dioguardia since Monday

> past? A. I refuse to answer on the grounds it may incriminate me."

As appears from the transcript of the testimony, the questions were then rephrased and the petitioner was asked as to the whereabouts of the books on different days before and after he was served with a subpoena (G.A. 32a). The petitioner, believing that he was being entrapped by the form of these questions, made the following statement which appears at page 31a of the Government's Appendix:

> "The Witness: They are leading up to something, well I would like to know what to do."

Because of this fear, the petitioner refused to answer a number of questions concerning the whereabouts of the books and records of the union on the ground that the answers would tend to incriminate him (G.A. 10a).

Accordingly, on April 17, 1956, the Assistant United States Attorney in charge of the interrogation of the petitioner brought the petitioner before the district judge. The Assistant United States Attorney, out of the 225 questions, chose 15 questions as the basis for a contempt proceeding and the court reporter who had been present before the Grand Jury identified his stenotype tape of these particular 15 questions addressed to the petitioner relative to the whereabouts of the books and records and his refusal to answer any of them.

The attorney for the petitioner who was present requested a copy of the Grand Jury minutes (A.A. 4). The Assistant United States Attorney stated that the Govern-

ment was not required to turn over a transcript of the testimony (A.A. 4).

The attorney for the petitioner, although unaware of the specific nature of all the questions asked the petitioner, gave a general explanation of the basis for the petitioner's fears that the answers to the questions put to him as to the whereabouts of the books and records of the union would be dangerous. He referred to the nature of the Grand Jury investigation, as indicated by charges made in the public press and to the litigation then pending in the United States District Court and brought by Mr. Lacey. The attorney for the petitioner represented to the district judge that he believed the petitioner was asserting his rights under the Fifth Amendment in good conscience because in his mind there was some doubt as to whether or not any of these answers might incriminate him by conspiracy, by association, or by any other subsequent action that the United States Attorney's office might commence (A.A. 11).

The Court directed petitioner to answer each of the 15 questions relating to the whereabouts of the books and records of the union (A.A. 15). On the same day, April 17, 1956, the witness reappeared before the Grand Jury and persisted in his refusal to answer the 15 questions relating to the whereabouts of the books and records of the local union (G.A. 46a).

On April 19, 1956, the petitioner was brought again before District Judge Noonan. The Assistant United States Attorney stated that the Grand Jury had not voted a contempt cifation but that the purpose of bringing the petitioner before the Court was for the purpose of having

the questions put to the petitioner by the Court in the presence of the Grand Jury, at which time and if the petitioner persisted in his refusal to answer the questions a contempt would be committed in the presence of the Court (A.A. 19).

The attorney for the petitioner made a request for a reasonable time to be heard, to prepare a defense to the proceeding (A.A. 20). He requested again a copy of any testimony before the Grand Jury (A.A. 20).

The district judge stated that the requests were premature for the proceeding was not actually, as the district judge stated, a contempt proceeding as he originally thought (A.A. 21). The district judge, in the presence of the Grand Jury, directed the petitioner to answer 15 questions which were chosen out of a long series of other questions as the basis for this summary contempt (A.A. 22). These questions were:

"Q. I am going to ask you some questions, including some that were put to you on Thursday which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records?

"Q. Mr. Curcio, have you ever had possession of the books and records of this local?

"Q. Did you have custody and control of these records last Thursday?

"Q. Do you have possession of those records or any of them today?

"Q. Do you have custody and control of any of those records today?

"Q. Where are any of those records today, if you know?

"Q. Who has any of those records today, if you know?

"Q. Where were any of these records or all of these records two weeks ago today?

"Q. Where were any or all of these records a week ago yesterday, Monday?

"Q. Where were any or all of these records this past Thursday?

"Q. Where were any or all of these records a week ago Saturday?

"Q. Where are any or all of these records today?

"Q. Who, if you know, had any or all of these records a week ago Saturday?

"Q. Who had any or all of these records a week ago yesterday?

"Q. Who had any or all of these records today?".

The petitioner again refused to answer these questions on the ground, as stated by the petitioner, that the answers might tend to incriminate him (A.A. 27). The Court reminded petitioner's attorney that they had the burden of establishing that there was a justification for the claim of privilege (A.A. 29) and in support of this ruling cited the *Trock* case (*United States* v. *Trock*, — F. (2d) —), decided by the Second Circuit Court of Appeals on April 9, 1956. (This decision was summarily reversed by this Court on an application for a writ of certiorari on June 11, 1956, six days after the decision of the Circuit Court of Appeals in this case (*Trock* v. *United States*, — U. S. —), 76 Sup. Ct. Rep. 1048 (No. 915, Oct. Term 1955).)

The attorney for the petitioner made another request for reasonable time to prepare a defense and to have it supported by witnesses and other documents which would be material and relevant (A.A. 30). Another request was made for a transcript of the testimony before the Grand Jury (A.A. 30).

There were repeated requests for a reasonable opportunity to prepare a defense and for a hearing and for a transcript of the testimony before the Grand Jury. Finally the district judge stated that "in a summary proceeding of this fashion, I don't think it is necessary * * *" (A.A. 31).

Some question arose at this point in the proceedings whether the proceeding then being held before the district judge was a secret or a public proceeding. The district court observed there was nothing secret about the proceeding and that any spectator was permitted to come into the courtroom. The district court made the following further observation (A.A. 32):

> "The Court: The press is here, I see; at least I assume they are members of the press. I think I recognize one. So there is no secrecy about this proceeding."

Again the attorney for the petitioner requested an opportunity to prepare a defense and call witnesses (A.A. 32).

The attorney for the petitioner insisted that the furnishing of a detailed explanation would amount to the petitioner testifying against himself (A.A. 34). The district judge replied (A.A. 34):

> "The Court: He is probably afraid that he will wake up some morning with his head in a cement

> block at the bottom of the East River if he talks too much, or at least he has to make some attempt to justify it, if he should talk later and say anything. He has got to make some showing in advance thereof that what he said was minimal and then only because the Court hit him over the head."

Petitioner's attorney pleaded for the opportunity of furnishing an explanation for the petitioner's refusal in the absence of the Grand Jury and in the absence of the Assistant United States Attorneys (A.A. 35). He stated later that he would furnish the explanation privately to the Court in the presence of the Assistant United States Attorney present, but in the absence of the Grand Jury (A.A. 35). The repeated requests for a hearing of any kind were denied and up to this point no transcript of the Grand Jury testimony was furnished to the petitioner or his attorney. The district court summarily adjudicated the witness in contempt of court and committed him to the custody of the marshal (A.A. 35).

The petitioner was sentenced to a six-months term with the privilege of purging himself of the contempt at any time by answering the questions (A.A. 35).

It was after the petitioner was found guilty of contempt of court that he was furnished for the first time with a complete transcript of the Grand Jury testimony.

An appeal was taken from the order of the district court to the United States Court of Appeals for the Second Circuit (A.A. 46). An application for bail was granted on May 7, 1956 (Clark, Chief Judge, Frank, Circuit Judge, concurring, and Hincks, Circuit Judge, dissenting).

The appeal was argued on May 14 and 15, 1956 before Medina, Lumbard and Waterman, Circuit Judges. On June 5, 1956, the Court below affirmed the judgment of the district court on the ground that the petitioner did not make a showing that he was likely to be endangered by answering the questions and that a hearing was not required nor necessary, nor could a hearing serve any useful purpose.

A petition for rehearing was denied by a decision rendered on June 22, 1956 and a stay of the mandate was granted.

Reasons for Granting the Writ

The decision of the Court below is directly in conflict with the applicable decisions of this Court in *Hoffman* v. *United States*, 341 U. S. 479, and *Trock* v. *United States*, — U. S. —, 76 Sup. Ct. Rep. 1048 (No. 915, Oct. Term 1955) decided by this Court on June 11, 1956, and which reversed a decision of the Second Circuit Court of Appeals. The decision of the Court below is also in conflict with the decision of the First Circuit Court of Appeals in *Carlson* v. *United States*, 209 F. (2d) 209, and the many decisions in other circuits. This confusion and conflict is thoroughly analyzed in an excellent article, Wolfram, "Peril, Pursuit and the Privilege Against Self-Incrimination: The Problem of the Apparently Innocuous Question", 5 Syracuse Law Review 127 (Spring 1954).

1. The first question relates to the procedure under Rule 42 of the Federal Rules of Criminal Procedure. The attorney for the petitioner made four separate requests for a hearing to produce witnesses and documents to

establish the petitioner's justification for the assertion of his privilege against self-incrimination (A.A. 20, 30, 31, 35). These requests included a request to furnish an explanation for the petitioner's silence in private in the absence of the press, spectators and the Grand Jury, but either with or without the presence of the Assistant United States Attorney (A.A. 35). The requests were not granted. Instead the district court speculated that the petitioner's refusal to furnish a detailed explanation was the fear of bodily harm (A.A. 34).

Circuit Judge Medina, writing the opinion for the Court below, justifies these refusals on the ground that the petitioner did not state as to who the witnesses were he intended to produce, or what would be the subject of their testimony. Actually, however, the district judge did not request a list of the witnesses, nor a statement of the nature of their testimony, but denied the requests on the ground that a hearing was not necessary (A.A. 31). The Court below agreed with the district court that in a proceeding under Rule 42(a) of the Rules of Criminal Procedure, no hearings are necessary or required and drew a distinction between the procedure under Rule 42(a) and the situation where a Grand Jury cites a witness for contempt for his refusal to answer questions before the Grand Jury, or where the proceeding is initiated by order to show cause (Opinion, Appdx. A, p. 32).

The offense allegedly committed by the petitioner consisted of an alleged disobedience to the direction of the Court to answer questions as directed by the Court. However, an essential element of the offense, therefore, is a determination of the validity of the Court's direction in

the light of the petitioner's rights under the Fifth Amendment. Therefore, the petitioner's duty to comply with the directions of the district court depended not upon the mere existence of the Court's order or direction, but upon the validity of the petitioner's claim of privilege.

This issue involves a determination of a number of issues of fact not within the personal knowledge of the judge and, therefore, petitioner as a matter of simple justice was entitled to a reasonable opportunity to produce witnesses and documents relevant to the factual issues to be determined. This type of contempt is far different from contempts committed in the presence of the Court and involving violence or other disturbances.

In *Cooke* v. *United States*, 267 U. S. 517, this Court held that if the elements of the offense of contempt depend upon determinations of issues of fact not within the personal knowledge of the judge, due process requires that the accused be given an opportunity to produce witnesses, documents and to offer explanations and arguments.

In the post *Hoffman* (341 U. S. 479) era, in determining the application of the privilege a court must examine the circumstances under which the questions were propounded and the full implication of the questions and the court must be governed not only by personal perception of the peculiarities of the case, but also by the facts. *Kiewel* v. *United States*, 204 F. (2d) 1 (C. C. A., 8, 1953).

Certainly "short cuts" should not affect the fundamental rights of a witness and whether the Assistant United States Attorney adopts the procedure under subdivision (a) of Rule 42 or the procedure under subdivision

(b), in either case the witness is entitled to an adequate opportunity to demonstrate his right to the assertion of the privilege against self-incrimination.

If the witness had been cited for contempt by the Grand Jury, or the witness had been prosecuted for contempt, as Chief Justice Warren stated in *Quinn* v. *United States*, 349 U. S. 155, 162, the respect normally accorded the privilege would be then buttressed by the presumption of innocence accorded to a defendant in a criminal trial.

Is this presumption to be eliminated because the Assistant United States Attorney chose to proceed under Rule 42(a) and have the questions simply repeated before the Court in the presence of the Grand Jury?

If, as the Court below held, a hearing under Rule 42(a) is not necessary, then how could the petitioner make a showing, which Circuit Judge Medina stated is lacking in this case, that the petitioner had any dealings with racketeers or extortionists or that Local 269, of which he was Secretary-Treasurer, was in some way involved in the controversy between Lacey and O'Rourke? In passing, it should be noted that this portion of the opinion of the Court below completely ignored the charges in the newspapers which was made part of the record in the Circuit Court of Appeals, to the effect that Local 269, of which petitioner was Secretary-Treasurer, was under the control of an alleged labor racketeer, John DioGuardia (A.A. 57, 58, 59, 60).

The Court below stated that the procedure adopted in the instant case followed the pattern long in vogue in the Second Circuit, and citing *United States* v. *Trock*, Second Circuit, — Fed. (2d) —, decided April 9, 1956.

While petitioner's appeal in the Court below was being argued, an application for a writ of certiorari was pending in this Court in *Trock* v. *United States*. On June 11, 1956, six days after the decision by the Court below in the instant case, this Court on the application for a writ of certiorari summarily reversed the Court below and reversed the judgment adjudging Trock guilty of contempt of court (*Trock* v. *United States*, — U. S. —, 76 Sup. Ct. Rep. 1048 (No. 915, Oct. Term 1955)). The following is the *per curiam* opinion:

> "Per curiam: Petition for writ of cert. granted and judgment reversed. Hoffman v. United States, 341 U. S. 479."

This Court's summary reversal of the decision of the Second Circuit Court of Appeals in the *Trock* case, is an indication that any effort to water down or take away the protection of the Fifth Amendment by resort to hair-splitting will not be tolerated.

The decision of the Court below is directly in conflict with the decision of the First Circuit Court of Appeals in *Carlson* v. *United States*, 209 F. (2d) 209. The Court in that case wrote as follows at page 215:

> "But although Rule 42 is not applicable, the constitutional requirement of due process of law makes it necessary for the judge to give the witness an adequate opportunity to be heard, and to introduce evidence, if the witness so desires, bearing on the issue whether, disregarding merely fanciful and far-fetched hypotheses, it is clearly evident from the implication of the question, in the setting in which it is asked, that a responsive answer might be dan-

gerous because injurious disclosure could result. See *Hoffman* v. *United States*, 1951, 341 U.S. 479, 71 S. C. 814, 95 L. Ed. 1118."

2. The second question relates to the refusal to furnish to the petitioner or his attorney a complete transcript of the Grand Jury testimony. The petitioner made four requests for a complete transcript of the Grand Jury testimony (A.A. 4, 20, 26, 30). These requests were denied. The complete transcript of the Grand Jury testimony was furnished after the petitioner was found guilty of contempt and this complete transcript has been printed as part of the Government's Appendix. It appeared, therefore, upon the argument of the appeal in the Court below, that the 15 questions were part of more than 200 questions and that the questions relating to the whereabouts of the books of the union, which petitioner refused to answer, were connected with other questions which carried the implication that petitioner was ordered by John DiGuardi, who had been identified as a labor racketeer, not to produce the books (A.G. 29a). As a basis for the contempt proceeding, the Assistant United States Attorney chose 15 questions out of a series of more than 200 questions.

The Court below wrote in its opinion that petitioner's demands for the transcript of the Grand Jury testimony were vague and belated. A reading of the testimony will indicate that they were certainly not vague and they were consistently made from the beginning of the proceedings.

Circuit Judge Medina wrote in his opinion that the petitioner was in constant consultation with his attorney during his appearance before the Grand Jury on April 12, 1956 (Opinion, Appdx. A, p. 33). The Court below implied

that the petitioner remembered 225 questions and that, therefore, as Judge Medina wrote, petitioner's counsel could have directed the attention of the Court to that part of the interrogation which might be claimed to support the alleged privilege. Placing this intolerable burden on a witness certainly perverts the constitutional protection against self-incrimination. Moreover, this sort of an approach cannot be reconciled with a decision of the same Court below in *United States* v. *Zwillman*, 108 F. (2d) 802, where the learned Augustus N. Hand wrote as follows at page 803:

> "It is true that the government was not obliged to disclose the testimony before the grand jury or to state the purpose of the inquest or whether prosecution of the defendant was proposed. But if it chose to adopt such an attitude and to confine the defendant's defense only to showing that the questions asked were incriminating on their face, it could not put him in contempt for declining to answer so long as it prevented him from adducing evidence that might demonstrate that his answers were likely to form vital links in the proof of a conspiracy in which he was involved. In the present case the government prevented him from showing that his answers would tend to incriminate him and thereby deprived him of his right to a proper trial where he could offer evidence in his defense."

3. The third question relates to whether it is evident from the implication of the questions asked the petitioner by the district judge in the presence of the Grand Jury, and the setting in which these questions were asked, that responsive answers to the questions or an explanation of

why they cannot be answered might be dangerous to the petitioner because injurious disclosure would result.

The Court below held that labor union officials are required to produce records of the union in their possession and that this requirement would be meaningless if the lawful custodian of the records could not offer possession to another and then refuse to say when or where he had last seen them, on the ground that any testimony on the subject would tend to incriminate him. The Court below held that to sustain the privilege under these circumstances would provide an easy method by which any investigation could be hamstrung from the start (Opinion, Appdx. A, p. 35).

In a recent decision by the same Court below other judges of the Second Circuit Court of Appeals had approved a finding of the district court permitting a custodian of record to refuse to answer questions as to the whereabouts of the books and records on the ground that "legal basis for resort to the privilege was found in the fact that testimony as to the destruction of the records might lead to prosecution for violation of I. R. C. Sec. 145(b) and evasion of the tax * * *." (*United States* v. *Patterson*, 219 F. (2d) 659.)

In the instant case, the setting was such that on petitioner's appearance before the Grand Jury petitioner could reasonably have feared that he was not only to be thoroughly investigated but that he was to be prosecuted. The appendix to petitioner's brief in the Court below included newspaper clippings, articles and magazines widely distributed containing news releases issued by the Government to the effect that a thorough investigation was to be

made by the Grand Jury of the seven recently chartered local unions of the International Brotherhood of Teamsters in connection with public charges that they were controlled by well-known gangsters, ex-convicts and labor racketeers (A.A. 51-66). The United States Attorney had examined prospective jurors of the Grand Jury of their knowledge of and acquaintance with John DiGuardi, described as a labor racketeer and extortionist, and allegedly President of Local 269, of which the petitioner was Secretary-Treasurer.

The Third Circuit Court of Appeals held in *United States* v. *Coffey*, 198 F. (2d) 440, that this alleged association would be enough to furnish sufficient weight and credibility to the suggested connecting chain of incriminating evidence.

The petitioner in the instant case was specifically asked whether he knew John DiGuardi, whether John DiGuardi had ordered him not to produce the books and records (G.A. 29a). These questions of course were not chosen as the basis for the contempt proceeding, but instead the Assistant United States Attorney chose other questions which sought to obtain the information in another way.

Can an Assistant United States Attorney justify a contempt proceeding by the expert use of scissors and choose questions which look harmless on their face when separated from other questions which are obviously incriminatory in nature?

The decision of the Court below is in conflict with the decisions in *Foot* v. *Buchanan*, 113 Fed. 156 (Circuit Court,

N. D., Mississippi, 1902) and *People* v. *Newmark,* 312 Ill. 625.

Petitioner honestly believed he was being trapped by these questions as rephrased for as appears from the transcript of the Grand Jury testimony, at page 31a he made this statement:

> "'The Witness: They are leading up to something, well, I would like to know what to do.''

In view of this setting, the petitioner could reasonably have sensed the peril of prosecution for a wide variety of federal offenses, including the Anti-Racketeering Act, the act prohibiting conspiracies to violate the laws of the United States, and conspiracies to obstruct justice. If in fact the petitioner conspired with John DiGuardi to hide or conceal the records, then the answers to the whereabouts of these books might conceivably lead to a charge to obstruct justice. *Bosselman* v. *United States,* 2 C. C. A., 239 Fed. 82; *Heinze* v. *United States,* 2 C. C. A., 181 Fed. 322.

The petitioner had reasonable grounds to suspect that he was being summoned before the Grand Jury in the hope that some incriminating disclosures could be extracted from him. *Maffie* v. *United States,* 1 C. C. A., 209 F. 2d 225.

In the quest for a satisfactory formula for the application of the privilege against self-incrimination, the Second Circuit in its decisions has placed upon the witness the burden of demonstrating that he was being hotly pursued for a federal offense. The Court below has not given this Court's decision in *Hoffman* v. *United States, supra,* 341

U. S. 479, the broad interpretation which this Court intended.

In *United States* v. *Trock*, — F. (2d) —, decided by the Court below on April 9, 1956, Chief Judge Clark referred to the conflicting principles of the applicable decisions and while expressing his sympathy for the law as it was developing begged for a holding by this Court that any honest claim of self-incrimination deliberately and positively made by a witness before a Grand Jury—a potential accused—must be respected.

This Court gave a decisive answer to this plea and summarily reversed the decision of the Court below on an application for a writ of certiorari in *Trock* v. *United States*, — U. S. —, 76 Sup. Ct. Rep. 1048 (No. 915, October Term, 1955, decided June 11, 1956). This Court reversed the decision of the Court below although as appeared in the majority opinion of the Court below that the appellant or petitioner was not a notorious criminal or racketeer, nor was apparently anyone else whose names were mentioned in the hearings before the district court, a feature which makes the instant case even stronger on the facts than the *Trock* case. This very quick and summary reversal indicates that this Court intends to give to its decision in *Hoffman* v. *United States*, a broad and liberal construction consistent with the view of this Court that the privilege must not be narrowly or begrudgingly applied. *Quinn* v. *United States*, 349 U. S. 155, 162.

Clearly, the questions presented are of particular importance in the administration of federal criminal law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

July 16, 1956.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

———o———

No. 385—October Term, 1955.

(Argued May 14 and 15, 1956 Decided June 5, 1956.)

Docket No. 24105

———o———

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH CURCIO,

Defendant-Appellant.

———o———

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

———o———

Appeal from an order of the United States District Court for the Southern District of New York. Gregory F. Noonan, *Judge.*

Defendant appeals from an order adjudging him in contempt for refusal to answer certain questions propounded to him by the District Judge before a Grand Jury. Affirmed.

———o———

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, New York City (Arthur H. Christy, Herbert M. Wach-

tell, Fioravante G. Perrotta and Charles H. Miller, Assistant United States Attorneys, New York City, of Counsel), *for appellee.*

Arnold Cohen, New York City (Samuel Mezansky and Arnold Cohen, New York City, of Counsel), *for appellant.*

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Medina, *Circuit Judge*:

On March 29, 1956, a Special Grand Jury was impanelled in the Southern District of New York to investigate charges of racketeering in the garment and trucking industries. Appellant, Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters, having been duly served with a personal subpoena, and a subpoena *duces tecum* calling for the production of certain books and records of the union, failed to produce the books and records and refused to answer questions as to their whereabouts, claiming an alleged privilege under the Fifth Amendment and asserting that answers to the questions might tend to incriminate him. For such refusal he was adjudged guilty of a criminal contempt, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, and sentenced to imprisonment for six months, unless he sooner purged himself by answering the questions. From the order containing such adjudication and commitment defendant appeals.

On his first appearance before the Grand Jury on Tuesday, April 10, 1956, in response to the subpoenas, appellant refused to answer any questions whatever, stating that he had not consulted a lawyer and that he would not testify

until he had done so. The matter was put over to Thursday, April 12, 1956, when appellant arrived with his counsel, who remained in the anteroom of the Grand Jury during the time of appellant's interrogation. The full record of what occurred has been released and is on file but is not part of the record before us. It does appear, however, that appellant was determined to give no information whatever concerning the whereabouts of the books and records, although he readily admitted that there were such books and records and that he was Secretary-Treasurer of Local 269. He did testify that these books and records were not in his possession either at the time of the service of the subpoena *duces tecum* (Monday, April 9), or at the time of his appearance before the Grand Jury (Thursday, April 12).

Accordingly, on April 17, the Assistant United States Attorney in charge of the interrogation of Curcio brought the matter of his recalcitrance before the District Judge for a determination of whether or not the Fifth Amendment plea should be sustained or overruled. The court reporter who had been present before the Grand Jury identified his stenotype tape of some fifteen questions addressed to appellant relative to the whereabouts of the books and records and his refusals to answer any of them. Appellant's counsel was present. His first move was to request that "the witness be furnished with a copy once the minutes are transcribed of the questions which are the subject in issue at the present time." The reporter then testified at length to the record of what occurred before the Grand Jury, giving the text of the fifteen questions and whatever was said in reference thereto by appellant, by the foreman

of the Grand Jury and by the Assistant United States Attorney conducting the examination of appellant.

The questions were:

Q. I am going to ask you some questions, including some that were put to you on Thursday which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records?

Q. Mr. Curcio, have you ever had possession of the books and records of this local?

Q. Did you have custody and control of these records last Thursday?

Q. Do you have possession of those records or any of them today?

Q. Do you have custody and control of any of those records today?

Q. Where are any of those records today, if you know?

Q. Who has any of those records today, if you know?

Q. Where were any of these records or all of these records a week ago Thursday?

Q. Where were any or all of these records a week ago Saturday?

Q. Where were any or all of these records a week ago yesterday, Monday?

Q. Where were any or all of these records this past Thursday?

Q. Where are any or all of these records today?

Q. Who, if you know, had any or all of these records a week ago Saturday?

Q. Who had any or all of these records a week ago yesterday?

Q. Who had any or all of these records today?

There was extended argument, principally by appellant's counsel, on the subject of whether or not there was any plausible basis for appellant's claim that answers to the questions might tend to incriminate him. The principal contention was:

> I am telling the Court in good conscience that he is asserting the Fifth Amendment because in his mind there is some doubt as to whether or not any of these answers might incriminate him by conspiracy, by association, or by any other subsequent action that the United States Attorney's office might start.

Reference was also made in a vague way to a civil litigation "going on on the 15th floor," which was a trial of a controversy between Martin T. Lacey and John J. O'Rourke over an election to the presidency of the Teamsters Joint Council. Lacey had charged that O'Rourke and his adherents, or some of them, were mixed up with gangsters and racketeers. Some photostats of newspaper clippings relating to the Lacey-O'Rourke controversy and also to a so-called drive against "city rackets" by the federal and local prosecutors, are contained in appellant's Appendix. But, so far as we can make out, there is nothing in the record before us to indicate that appellant is connected with or suspected of being connected with any crime.

At the close of an extended argument the court directed appellant to answer each of the fifteen questions and the Assistant United States Attorney stated "for the record" that there were other questions, not relating to the books and records, which appellant had refused to answer and, with the approval of the court, these were reserved for

"some future date," should the government desire rulings thereon. No objection to this procedure was made by appellant's counsel who merely requested an opportunity to consult with his client before appellant returned to the Grand Jury room; and this request was granted.

On April 19, 1956, appellant returned to the Grand Jury and persisted in his refusal to answer any of the questions pertaining to the whereabouts of the books and records. Appellant was brought before the court and, after some further argument to which reference will be made shortly, the Court in the presence of the Grand Jury directed appellant again to answer the questions. Upon his refusal to do so he was adjudged in contempt.

Appellant claims that he was not afforded a hearing as required by law, that he was not furnished with a full copy of the minutes of the Grand Jury proceedings during his interrogation on April 10 and April 12, and that he was justified in refusing to answer the questions.

We find no defect in the procedure followed here, which follows the pattern long in vogue in this Circuit. See *United States* v. *Trock*, 2 Cir., —— F. 2d ——, decided April 9, 1956. Appellant did have a full and fair hearing on April 17. The subject matter of this hearing was the exercise of his alleged constitutional right under the Fifth Amendment. Both appellant and his counsel were afforded every opportunity to produce any evidence, by appellant or by others, which might tend to show that there was a plausible basis for the claim of privilege. But nothing was said about any witnesses nor can we find any basis whatever for appellant's alleged fear that he may be "trapped," as he expressed it.

The requests for "a list of specifications," for a transcript of the testimony of appellant before the Grand Jury on April 12, and for "a reasonable time to prepare the defense" and "have it supported by witnesses or any other documents that I may feel are relevant or material to the defense of contempt in a contempt proceeding," were all made on April 19, after appellant had again refused to answer the questions. These demands were evidently based upon a misconception of the function of the proceedings which had already taken place on April 17, or they constituted a last ditch effort to delay the proceedings. There is no indication as to who the witnesses were or what would be the subject of their testimony. Perhaps counsel did not anticipate that the court would without further ado, and in the presence of the Grand Jury, himself put the questions to the witness and direct him to answer. But that is what took place; and the refusals to answer thus clearly constituted a criminal contempt "in the actual presence of the court," to be punished summarily, as provided in Rule 42(a) of the Federal Rules of Criminal Procedure. No hearing on this phase of the matter was required or necessary; nor could a hearing have served any useful purpose.

Nothing to the contrary was held by the First Circuit in *Carlson* v. *United States*, 209 F. 2d 209 or in *Hooley* v. *United States*, 209 F. 2d 219. Had the Grand Jury merely cited or presented appellant to the court, for his refusals before the Grand Jury to answer questions in accordance with the prior directions of the court, an entirely different situation would have been presented. Had that been the

case here the contempt would not have been committed "in the actual presence of the court."

Nor do appellant's contentions find support in *United States* v. *Zwillman*, 2 Cir., 108 F. 2d 802. That was also a case where the alleged contempt had been committed in the presence of the Grand Jury, not in the presence of the court. At the hearing which covered the entire matter, including such argument or evidence as had relevancy to defendant's claim of privilege under the Fifth Amendment, counsel asserted that a scrutiny of the Grand Jury minutes of defendant's interrogation would reveal the fact that he had been engaged in the liquor business before the repeal of the Eighteenth Amendment, and he also proffered witnesses on the subject. As the questions which Zwillman refused to answer sought to elicit the names of his business associates in the years 1928 to 1932, it was held that there had been a curtailment of his right to "show that he was likely to be endangered by answering," and the contempt adjudication was reversed. Here the very contrary appears. There was a hearing at which appellant was given the fullest opportunity to "show that he was likely to be endangered by answering," and he failed to do so. At the hearing on April 17 there was no intimation that anything said by appellant in his so-called testimony before the Grand Jury on April 12 had any bearing on his refusals to answer the questions concerning the whereabouts of the books and records, nor was any such suggestion made at any time. Appellant was in constant consultation with his counsel during the entire period of his appearance before the Grand Jury on April 12, and it is reasonable to suppose that counsel would have directed

the attention of the court to any part of such interrogation which might be claimed to support the alleged privilege, as was done in the *Zwillman* case. Mere vague and belated demands such as we have in this record are plainly insufficient.

It should be unnecessary to add that counsel's suggestion, just before the court propounded the questions to appellant for the last time, that he inform the court confidentially, and in the absence of the Grand Jury, of "exactly what is in my mind, and most likely in my client's mind," added nothing of significance to the record.

On the merits we think the case too clear for reasonable debate. In *United States* v. *White*, 322 U. S. 694, the Supreme Court refused to recognize a claim of privilege asserted by a labor union official with respect to certain records of the union in his possession because, as the Court stated at page 699:

> (T)he official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally.

This requirement to produce would be no more than an empty and meaningless form of words if the lawful custodian of the records could hand over possession to another and then refuse to say when or where he had last seen them on the ground that any testimony on the subject would tend to incriminate him. To sustain the privilege

here asserted would provide an easy method by which any investigation could be hamstrung from the start.

Although there is nothing before us to show that appellant has had any dealings with racketeers or extortionists, we may assume that Local 269 is in some way involved in the controversy between Lacey and O'Rourke and that he has or has had some contact with O'Rourke, who, we are told, has been charged with seeking the presidency of the Teamsters Joint Council through the acts of gangsters and racketeers. We are nevertheless at a loss to see how appellant's answers to any of the fifteen questions here propounded can have any tendency to incriminate him.

It is said that he has a criminal record. But what of that? We are not informed of the nature of the charge upon which he was convicted nor of the date thereof; nor have we any reason to suppose that there is any connection between the whereabouts of the books and records of Local 269 and the crime or crimes which appellant is said to have committed.

It seems to be supposed by counsel that notorious criminals, racekteers and unsavory characters generally have an open sesame to the privilege guaranteed by the Fifth Amendment. But we can draw no such inference from the rulings made in *Hoffman* v. *United States*, 341 U. S. 479 and *United States* v. *Doto*, 2 Cir., 205 F. 2d 416, strongly relied upon by appellant. It is not the general reputation or criminal record of the witness which controls but rather the circumstances of each particular case. The constitutional rights of the so-called "little fellow" are entitled to

no less protection than are the rights of those who pursue a career of crime in the grand manner. The test is whether or not on the record before the court defendant has made a showing "that he was likely to be endangered by answering the questions." *United States* v. *Zwillman, supra.* We can find no such showing here.

United States v. *Trock,* —— F. 2d ——, decided by this Court on April 9, 1956, is especially urged upon us as in some way supporting appellant's contentions. But there is no similarity whatever between the two cases. In that case there was an insufficient showing of peril to the witness; here there is no showing whatever. Mere atmosphere will not suffice.

Affirmed.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 260

JOSEPH CURCIO, *Petitioner*

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF PETITIONER RESPECTING POSSIBLE MOOTNESS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF PETITIONER RESPECTING POSSIBLE MOOTNESS

Petitioner, Joseph Curcio, respectfully submits this memorandum in response to the memorandum of the Solicitor General submitted heretofore to the Court, calling attention to new facts which purportedly raise a possible question of mootness in this case. Although in his memorandum the Solicitor General asserts that it is the Government's opinion "that these new facts do not render the case moot", nevertheless, there is fashioned in this memorandum an argument tending to support a judgment that this case is now in fact moot. Petitioner has been sentenced to imprisonment and is therefore constrained to vigorously disagree with this argument.

If the Solicitor General's memorandum be deemed a "motion" on behalf of the Government to dismiss the writ of certiorari granted in this case on the ground of mootness, then it is respectfully submitted that this motion should in all respects be denied.

As to the statement of new facts set forth in the Government's memorandum, petitioner desires to relate some facts omitted from the Government's statement and to explain the circumstances under which these new facts developed.

Subsequent to the grant of the writ of certiorari in this case (October 8, 1956), the United States Attorney's office learned from the bookkeeper and the accountant for the union of the existence and location of certain books and records of the union. These particular books and records in the main have starting entries of August 1956. Consequently, in the main, it must be stated frankly that they could not have been the records called for by the subpoenas served on petitioner on April 10, 1956. Upon learning of the existence and location of these other books and records, the United States Attorney caused a new subpoena to be served on petitioner on or about November 8, 1956 calling for their production.

In response to this new subpoena, petitioner appeared before the Grand Jury and sought to avoid compliance with the new subpoena on the ground that the production of the records at this time would conflict with the pendency of petitioner's case before this Court. Thereafter, an order to show cause was issued by the District Court, requiring petitioner to show cause why he should not be held in contempt a second time. On the return of the order to show cause on November 14, 1956, petitioner appeared with

counsel before the Court, explaining that to comply with the new subpoena might in effect prejudice petitioner's case before this Court, unless some disposition were made of the previous contempt order. Inquiry was made at the hearing before Judge Cashin as to what effect the production of the books and records would have on the previous contempt, which is the subject matter of the appeal to this Court. The Assistant United States Attorney stated unequivocally that as far as the Government was concerned, it would have no effect and that the Government wanted Curcio to go to jail for his first refusal to answer questions as to the whereabouts of books and records in April 1956. The Court thereupon ordered petitioner to produce the books and records called for by the second subpoena and, over counsel's objection, the records were produced.[1]

Notwithstanding the statement set forth at page 3 of the Government's present memorandum, to the effect that defense counsel finally agreed that petitioner would produce the books and records for the Grand Jury, at no time did defense counsel so agree, and the production of the books and records called for by the second subpoena was done over counsel's objection and under threat of a new contempt proceeding and another jail sentence.

In the instant cause which is awaiting argument before this Court, the petitioner has been adjudged guilty of a criminal contempt, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, and has been sentenced to imprisonment for six months. The criminal nature of the

[1] Compliance with a judgment under duress or by the exercise of coercive power does not render a case moot. *Bakery Drivers Union* v. *Wagshal*, 333 U. S. 437; *Cahill* v. *New York, New Haven & Hartford Railroad Co.*, 351 U. S. 183.

petitioner's act was the dominant feature of the proceeding and the proceeding was instituted at the instance of the United States. That sentence still stands and, so far as the petitioner is concerned, he has been found guilty of an infamous offense involving in its punishment the loss of his liberty. Certainly, therefore, as to him, this case is far from moot. It is true that by the very nature of the order punishing him for contempt, he is "carrying the keys of the prison in his own pocket". *In re Nevitt*, 117 F. 448, 461. Petitioner still believes that answering the questions, which were the subject matter of the contempt proceeding, would in fact result in his incriminating himself of a possible charge of conspiracy to obstruct justice or other offenses under the United States laws which the Government may seek to commence against him. At this stage of the cause, he should not be coerced into that perilous position.

The petitioner claims his conviction was obtained by a procedure which fails to comport with due process of law, in that the decision of the Court below was directly in conflict with the applicable decisions of this Court (Petition for Writ of Certiorari, Oct. Term 1956 No. 260 pp. 15-26). It is no solace to him that the Government concedes now at page 4 of its brief that with the books produced in its hands, that if questions were now put to petitioner concerning the whereabouts of the books his claim of privilege with respect thereto would be in a "different posture" than in the original proceeding now before the Court.

The petitioner's "posture" has not changed so long as the judgment of conviction remains in effect.

The suggestion in a footnote to the brief of the Solicitor General that on remand the district court may modify the sentence if it is appropriate to do so (Rule 35, F. R. Crim. P.), is hardly an adequate substitute for a determination on the merits of the constitutional questions involved in this case. The petitioner is reluctant to place himself at the mercy of the district judge before whom he ostensibly was contemptuous.

If in fact, as the Solicitor General admits, the petitioner's claim of privilege with respect to the original questions asked the petitioner is now in a different posture, this same spirit of frankness with which this statement is made requires one further step. In view of the nature and character of the conditions which might have caused, as the Solicitor General states, the case to become moot, the ends of justice exact that the United States should voluntarily consent to vacating the order adjudging the petitioner guilty of a criminal contempt and sentencing him to imprisonment. *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 478. This seems to be the established rule in federal practice in civil cases declared moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39. There is no counterpart of this procedure in federal criminal cases.[2]

If the Government believes that this case has now become moot, then it should be willing to have the procedure followed in civil cases applied to this case, with the judgment

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[2] Quaere: May this Court consider these briefs as an application to vacate the judgment of conviction and remand this case to the district court to dismiss the proceeding, as it did in *Trock* v. *United States*, 351 U. S. 976, on the authority of *Hoffman* v. *United States*, 341 U. S. 479.

of the Court of Appeals reversed or vacated and the proceeding remanded to the district court with a direction to dismiss.

Respectfully submitted,

SAMUEL MEZANSKY,
Attorney for Petitioner.

DANIEL H. GREENBERG,
on the Brief.

December, 1956

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Supreme Court of the United States

October Term, 1956

No. 260

JOSEPH CURCIO,

Petitioner;

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals is reported at 234 F. (2d) 470.

Jurisdiction

The judgment of the Court of Appeals was entered on June 5, 1956 (R. 112).

A petition for rehearing was denied by the Court of Appeals on June 22, 1956 (R. 112). The petition for writ

of certiorari was filed on July 18, 1956 and was granted on October 8, 1956 (352 U. S. 820).

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

Questions Presented

I.

Whether petitioner was properly summarily adjudged in contempt under Rule 42(a) of the Federal Rules of Criminal Procedure, and whether he was denied the right to a hearing and to an adequate and reasonable opportunity to be heard and to introduce evidence in a hearing pursuant to Rule 42(b) that might demonstrate that his answers to questions put to him by the Court in the presence of the Grand Jury would incriminate him.

II.

Whether petitioner could be put in contempt for his failure to answer questions directed to be answered by the Court in the presence of the Grand Jury, so long as it denied to the petitioner a complete transcript of the Grand Jury testimony, for the purpose of demonstrating that the 15 questions chosen as the basis for the contempt proceeding were part of a series of other questions which were obviously incriminatory in nature.

III.

Whether the Court properly overruled the exercise by the petitioner of his privilege under the Fifth Amendment to the Constitution, in view of the implications of the ques-

tions asked the petitioner by the Court in the presence of the Grand Jury and the setting in which these questions were asked.

Constitutional Provision, Statute and Rule Involved

United States Constitution, Amendment V, provides in pertinent part:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

18 U. S. C. 401 provides in pertinent part:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Rule 42, Federal Rules of Criminal Procedure, provides:

> "(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) *Disposition Upon Notice and Hearing.* A criminal contempt, except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts con-

stituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Statement

On April 19, 1956, in the United States District Court for the Southern District of New York, District Judge Gregory F. Noonan cited petitioner for contempt of court under the authority of 18 U. S. C. 401 (3), and in accordance with Rule 42(a) of the Federal Rules of Criminal Procedure (*supra*, p. 3).

Petitioner was ordered confined for six months, with the proviso that he could purge himself of the contempt by answering the questions he had been directed to answer (R. 41-43).

This contempt citation grew out of the following circumstances:

On March 29, 1956, a special Grand Jury was impanelled in the Southern District of New York by District Judge Archie O. Dawson to investigate allegations of racketeer-

ing in the garment and trucking industries in New York City (New York Times, March 7, 1956, R. 52).

This investigation followed wide-spread public charges that seven local unions were recently chartered by the International Brotherhood of Teamsters to gain control of the Teamsters Joint Council and that these local unions were controlled by well-known gangsters, ex-convicts and labor racketeers, particularly one John DiGuardi, alias "Johnny Dio" (New York Post, January 25, 1956; New York Times, March 14, 1956; New York Times, March 16, 1956; New York Times, March 23, 1956, R. 51-60).

These same charges were repeated in a civil action commenced in the Southern District of New York by one Martin T. Lacey, President of the Teamsters Joint Council. In fact, District Judge Noonan, who cited petitioner for contempt of court, which is the subject matter of this appeal, granted a temporary restraining order in that civil action. Presumably, therefore, he was fully familiar with the charges made in that civil action (New York Times, March 23, 1956, R. 55).

It also turned out that one of the Assistant United States Attorneys who had questioned the petitioner before the Grand Jury, had conferred with Mr. Lacey in respect to his charges before the petitioner had been subpoenaed to appear before the Grand Jury (New York Times, March 30, 1956, R. 56).

It is also significant that in the examination of the prospective Grand Jurors for the Grand Jury investigation, the United States Attorney asked the jurors whether they were acquainted with John DiGuardi, who was identified

as a labor racketeer and extortionist (New York Times, March 30, 1956, R. 56).

It was in this setting that the petitioner, Joseph Curcio, Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters, was served with two subpoenas (a personal subpoena and a subpoena duces tecum) for his appearance before the Grand Jury on April 10, 1956, and for the production of certain books and records of the union (R. 47-48). The subpoenas which directed the appearance of the petitioner stated that the petitioner's testimony was to be taken "to testify all and everything which you may know in regard to an alleged violation of Section 371, Title 18 U. S. C., on the part of the United States* * *." Local 269, of which the petitioner was Secretary-Treasurer, was one of the seven local unions alleged to have been chartered for the purpose of controlling the election of the Presidency of the Teamsters Joint Council and the newspapers carried reports that this union was allegedly controlled and run by labor racketeers and gangsters.

The petitioner appeared before the Grand Jury on April 10, 1956 and refused to answer questions on the ground, as he stated at the time, "you are throwing legal stuff here and I don't know whether you are trapping me or not" (R. 65). The petitioner was directed to return again on April 12, 1956.

On April 12, 1956, petitioner appeared before the Grand Jury. He stated he was the Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters (R. 68); that the union had books and records to his knowledge (R. 76); that the books and records of the union were not in his possession (R. 77) either at the time of the service of the subpoena duces tecum (Monday, April 9, 1956) or at

the time of his appearance before the Grand Jury (Thursday, April 12, 1956).

The transcript of the testimony taken before the Grand Jury was not furnished to the petitioner or his attorney until after petitioner was found guilty of contempt. However, the entire transcript of the Grand Jury testimony was printed by the Government and made part of the record on appeal in the Circuit Court of Appeals and as part of the record now before this Court (R. 61-102).

An examination of this transcript, furnished as we have indicated, after the petitioner was found guilty of contempt, indicates that from some of the questions asked the petitioner, there was an implication that petitioner was being charged with a conspiracy with John DiGuardi, identified as an ex-convict and labor racketeer in the public press, to obstruct justice. These questions were (R. 83-84):

> "Q. I believe that you said you were served with two subpoenas between the hours of 3 and 4 this past Monday, is that correct? A. When you say two subpoenas, you mean the card and the paper?
>
> Q. Yes. A. Yes, sir.
>
> Q. Did you get in touch with anyone after you were served with those subpoenas? A. I tried to reach my attorney.
>
> Q. That's not the question I asked you. A. I refuse to answer on the grounds it may tend to incriminate me.
>
> Q. You know John Dioguardia? A. I refuse to answer on the grounds it may tend to incriminate me.
>
> Q. Have you had conversations with John Dioguardia since this past Monday? A. I refuse to

answer on the grounds that it may tend to incriminate me.

Q. Mr. Foreman, I request that the witness be directed to answer that question.

Foreman: The last question?

Mr. Perrotta: The series of questions that I put to him.

Foreman: The series of questions. Will the stenographer read off the series of questions, and I direct the witness to answer the series of questions one at a time and please ask them one at a time.

(Stenographer reads: 'Q. Did you try to get in touch with John Dioguardia after you received those subpoenas?')

Witness: I maintain my privilege.

Mr. Perrotta: Would you read the next question, please?

(Stenographer reads: "Q. You know John Dioguardia?')

Witness: I maintain my privilege.

Q. Did John Dioguardia order you not to come down or, rather, order you not to produce the books and records of Local 269? A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Have you seen John Dioguardia since Monday past? A. I refuse to answer on the grounds it may incriminate me.'"

The Assistant United States Attorney, realizing that the petitioner would be justified in refusing to answer these questions, attempted to get the same information by rephrasing his questions and inquiring as to the whereabouts of the books and records at specific times (R. 85-87).

The petitioner, believing that he was being entrapped by the form of these questions, made the following statement which appears at page 85 of the Record:

> "The Witness: They are leading up to something, well, I would like to know what to do."

Obviously, because of this fear, the petitioner refused to answer a number of questions concerning the whereabouts of the books and records of the union on the ground of self-incrimination (R. 86-87).

The petitioner was then excused, with instructions to return on April 17, 1956.

On April 17, 1956, petitioner reappeared before the Grand Jury and declined again, on the ground of self-incrimination, to answer any questions as to the whereabouts of the books and records at specific times (R. 97-99).

The Grand Jury recessed and reconvened later the same day before District Judge Noonan. At these proceedings before Judge Noonan, the Assistant United States Attorney, out of the 225 questions asked the petitioner before the Grand Jury, 15 selected questions as the basis for a contempt proceeding. At this time the Grand Jury stenographer read approximately 15 questions chosen by the Assistant United States Attorney, relating to the whereabouts of the books and records of the union on specific dates, which the petitioner had declined to answer on the ground of self-incrimination (R. 5-10).

Petitioner's counsel asked for and was denied a transcript of the entire Grand Jury testimony (R. 4). The

Assistant United States Attorney stated the Government was not required to turn over a transcript of the testimony (R. 4-5).

When the attorney for the petitioner was asked by Judge Noonan how the answering of these questions would incriminate the petitioner, Mr. Cohen, petitioner's counsel, gave a general explanation of the basis for petitioner's fears. Petitioner's counsel, of course, was unaware of the general nature of the remaining questions asked petitioner before the Grand Jury and he referred generally to the nature of the Grand Jury investigation, as indicated by charges made in the public press and to the civil litigation then pending in the United States District Court and brought by Mr. Lacey (R. 10-11).

Petitioner's counsel represented to the District Judge that the petitioner was asserting his rights under the Fifth Amendment in good conscience because in his mind there was some doubt "as to whether or not any of these answers might incriminate him by conspiracy, by association, or by any other subsequent action that the United States Attorney's office might commence" (R. 11).

The Court then informed petitioner that his claim of privilege was improperly exercised and directed him to return to the Grand Jury room and answer as many of the questions (which the Grand Jury stenographer read) as the United States Attorney saw fit to re-ask (R. 16).

Later that same day, petitioner was taken before the Grand Jury and declined to answer the 15 questions he had been directed to answer by the Court earlier that day (R. 99-102). He was directed to appear again on April 19th. He was then brought before Judge Noonan again (R. 17).

In the presence of the Grand Jury, Judge Noonan asked him the same 15 questions he had previously been directed to answer (R. 27-28). Petitioner declined to answer on the ground of self-incrimination (R. 27-28).

The Assistant United States Attorney justified the procedure to be followed at this proceeding by explaining that the Grand Jury had not voted a contempt citation, but the purpose of bringing the petitioner before the Court was for the purpose of having the questions put to the petitioner by the Court in the presence of the Grand Jury, at which time and if the petitioner persisted in his refusal to answer the questions, a contempt would be committed in the presence of the Court (R. 19-20).

Petitioner's counsel made a request for a reasonable time to be heard, to prepare a defense to the proceeding (R. 20). He requested again a copy of any testimony before the Grand Jury (R. 20).

The district judge stated that the requests were premature for the proceeding was not actually, as the district judge stated, a contempt proceeding as he originally thought (R. 21). As we stated earlier, the district judge, in the presence of the Grand Jury, directed the petitioner to answer 15 questions which were chosen out of a long series of other questions as the basis for this summary contempt (R. 27, 31). These questions were:

> "Q. I am going to ask you some questions, including some that were put to you on Thursday which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records?

Q. Mr. Curcio, have you ever had possession of the books and records of this local?

Q. Did you have custody and control of these records last Thursday?

Q. Do you have possession of those records or any of them today?

Q. Do you have custody and control of any of those records today?

Q. Where are any of those records today, if you know?

Q. Who has any of those records today, if you know?

Q. Where were any of these records or all of these records two weeks ago today?

Q. Where were any or all of these records a week ago yesterday, Monday?

Q. Where were any or all of these records this past Thursday?

Q. Where were any or all of these records a week ago Saturday?

Q. Where are any or all of these records today?

Q. Who, if you know, had any or all of these records a week ago Saturday?

Q. Who had any or all of these records a week ago yesterday?

Q. Who had any or all of these records today?''

The petitioner again refused to answer these questions on the ground, as stated by the petitioner, that the answers might tend to incriminate him (R. 31). The Court reminded petitioner's attorney that they had the burden of establishing that there was a justification for the claim of privilege (R. 29) and in support of this ruling cited the *Trock* case (*United States* v. *Trock*, 232 F. (2d) 839), decided by the Second Circuit Court of Appeals on April 9, 1956. This decision was summarily reversed by this Court on

an application for a writ of certiorari on June 11, 1956, six days after the decision of the Court of Appeals in this case (*Trock* v. *United States*, 351 U. S. 976).

The attorney for the petitioner made another request for reasonable time to prepare a defense and have it supported by witnesses and other documents which would be material and relevant (R. 30). Another request was made for a transcript of the testimony before the Grand Jury (R. 30).

There were repeated requests for a reasonable opportunity to prepare a defense and for a hearing and for a transcript of the testimony before the Grand Jury (R. 30). Finally, the district judge stated that "in a summary proceeding of this fashion, I don't think it is necessary * * * " (R. 31).

Some question arose at this point in the proceedings whether the proceeding then being held before the district judge was a secret or a public proceeding (R. 32). The district court observed there was nothing secret about the proceeding and that any spectator was permitted to come into the courtroom. The district court made the following further observation (R. 32):

> "The Court: The press is here, I see; at least I assume they are members of the press. I think I recognize one. So there is no secrecy about this proceeding."

Again the attorney for the petitioner requested an opportunity to prepare a defense and call witnesses (R. 32).

The attorney for the petitioner insisted that the furnishing of a detailed explanation would amount to the petitioner

testifying against himself (R. 34). The district judge replied (R. 34):

> "The Court: He is probably afraid that he will wake up some morning with his head in a cement block at the bottom of the East River if he talks too much, or at least he has to make some attempt to justify it, if he should talk later and say anything. He has got to make some showing in advance thereof that what he said was minimal and then only because the Court hit him over the head."

Petitioner's attorney pleaded for the opportunity of furnishing an explanation for the petitioner's refusal in the absence of the Grand Jury and in the absence of the Assistant United States Attorneys (R. 35). He stated later that he would furnish the explanation privately to the Court in the presence of the Assistant United States Attorney, but in the absence of the Grand Jury (R. 35). The repeated requests for a hearing of any kind were denied. The district court summarily adjudicated the witness in contempt of court and committed him to the custody of the marshal (R. 35).

The petitioner was sentenced to a six months term with the privilege of purging himself of the contempt at any time by answering the questions.

It was after the petitioner was found guilty of contempt of court that he was furnished for the first time with a complete transcript of the Grand Jury testimony.

An appeal was taken from the order of the district court to the United States Court of Appeals (R. 46). An application for bail was granted on May 7, 1956 (Clark, Chief Judge, Frank, Circuit Judge, concurring, and

Hincks, Circuit Judge, dissenting). The appeal was argued on June 5, 1956 before Circuit Judges Medina, Lumbard and Waterman. The Court of Appeals (opinion by Circuit Judge Medina) could find nothing that justified petitioner's claim of the privilege against self-incrimination in answering questions pertaining to the whereabouts of the books and records of the union. The Court of Appeals held that the petitioner had a fair hearing and was entitled to no further hearing under Rule 42(a) applicable when a contempt is committed in the actual presence of the court (R. 108-109). No error was found in the denial of the transcript of the Grand Jury testimony on April 12, 1956. Judge Medina noted that the petitioner, on the hearing of the claim of privilege, intimated nothing about his testimony before the Grand Jury having a bearing on his refusal to answer questions relating to the whereabouts of the books and records; and, further, that petitioner was in constant consultation with his attorney at the time the requested testimony was given and, therefore, it was reasonable to suppose that his counsel could have directed the district court's attention to any part of the testimony which might have supported the claim of privilege (R. 110).

In the brief filed by the United States, in opposition to the petition for a writ of certiorari, the Solicitor General supported the decision of the Second Circuit for reasons other than those stated by Judge Medina. The Solicitor General contended that the issue before the district judge was solely a question of law; that there were no controlling factual issues of any kind; and, in view of the nature of the issue, which was before the district court for determination, there was no necessity to furnish petitioner with

a copy of the Grand Jury minutes. (Brief for the United States, in opposition to the petition for writ of certiorari, pp. 13-17.)

Summary of Argument

The procedure adopted in the district court deprived petitioner of the right to a proper hearing and an adequate and reasonable opportunity to be heard and to produce evidence in support of his claim that the questions put to him would tend to incriminate him. The act of the district judge in having a few select questions drawn from the many propounded to petitioner before the Grand Jury, then put by the judge himself to petitioner in open court, with petitioner continuing to refuse to answer these questions, cannot be the basis of a wilful contempt committed by petitioner in the presence of the judge, authorizing invocation of the summary contempt procedure under Rule 42(a), F. R. Cr. P., without the hearing required by Rule 42(b). *Carlson* v. *United States*, 209 F. (2) 209, 214-217 (C. A. 1st); *Wong Gim Ying* v. *United States*, 231 F. (2) 776, 780 (C. A. D. C.). The reliance by the court of appeals on its rule in *United States* v. *Trock*, 232 F. (2) 839, in authorizing and approving the procedure followed in this case is misplaced, especially in light of the summary reversal of that case by this Court. *Trock* v. *United States*, 351 U. S. 976.

The failure of the district judge to order the Government to furnish petitioner with a complete transcript of his testimony and of the many questions put to petitioner before the Grand Jury, to enable petitioner to prepare a

defense to the contempt proceeding, prior to adjudging petitioner summarily in contempt, was error, especially in view of the fact that the complete transcript of petitioner's appearances before the Grand Jury discloses a broad, searching interrogration of petitioner with respect to possible criminal associations. *Hoffman* v. *United States*, 341 U. S. 479; *Trock* v. *United States*, 351 U. S. 976, reversing 232 F. (2) 839 (C. A. 2nd); *Carlson* v. *United States*, 209 F. (2) 209 (C. A. 1st); *United States* v. *Zwillman*, 108 F. (2) 802 (C. A. 2nd).

Petitioner's exercise of his privilege against self-incrimination under the Fifth Amendment to the Constitution was proper, in view of the implications of the questions asked petitioner both before the Grand Jury and by the district judge in open court. To have answered these questions would have resulted in petitioner furnishing "a link in the chain of evidence needed to prosecute (him) for a federal crime." *Hoffman* v. *United States*, 341 U. S. 479, 486. Petitioner's refusal to answer questions as to the whereabouts of the Union books and records was not the assertion of any personal privilege respecting those records, but rather, was an assertion of a personal privilege against self-incrimination directed to all the questions put to him both before the Grand Jury and by the district judge. *United States* v. *Patterson*, 219 F. (2) 659 (C. A. 2nd). The cases of *United States* v. *White*, 322 U. S. 694 and *Rogers* v. *United States*, 340 U. S. 367, are not applicable to the facts of this case.

ARGUMENT

The entire atmosphere and setting underlying this case, with attendant newspaper publicity, was that of a special Grand Jury investigation into alleged racketeering in the trucking and garment industries in New York City. A special Grand Jury was empaneled during March 1956 for the sole purpose of conducting an inquiry into crime and racketeering aimed at "professional racketeers" and "unscrupulous officers and agents of labor organizations not for the benefit of the union members but for their personal individual gain" (R. 52; New York Times, March 7, 1956 pp. 1 and 28).

As part of this investigation and inquiry petitioner was served with two subpoenas compelling his appearance before this special Grand Jury. One subpoena was a personal one; the other was a subpoena duces tecum requiring the production of union books and records directed at petitioner as secretary-treasurer of Local 269 of the teamsters' union (R. 47-49). Petitioner appeared in response to these subpoenas, and during the course of the examination conducted of him, approximately 225 questions were asked. Many of these questions related to petitioner's association with persons described in the press as "racketeers" (R. 55, 56, 84, 88). Petitioner asserted his privilege against self-incrimination before the Grand Jury, commenting at one point:

> "The Witness: They are leading up to something. Well, I would like to know what to do" (R. 85).

It is also to be observed that there were three assistant United States atttorneys who participated in petitioner's

interrogation, and they took turns putting questions to him. In this setting, in this atmosphere, it is no wonder that petitioner invoked his privilege and sought to maintain it. The entire proceeding was most improper.

Transferring the proceeding to the forum of the district judge merely served to heighten and emphasize the improper character of the proceeding before the Grand Jury. But here the proceeding took on a different character. The district judge put fifteen selected questions to petitioner, questions chosen in isolation from the context of the complete interrogation before the Grand Jury. At this point petitioner sought relief from the court. He requested a transcript of his testimony and the interrogation before the Grand Jury, and time to call witnesses and present evidence that his claim of privilege was made in good faith (R. 20, 21, 30, 32). To these requests the district judge commented:

> "The Court: He is probably afraid that he will wake up some morning with his head in a cement block at the bottom of the East River if he talks too much, or at least he has to make some attempt to justify it, if he should talk later and say anything. He has got to make some showing in advance thereof that what he said was minimal and then only because the Court hit him on the head" (R. 34).

The court thereupon invoked Rule 42(a) of the Federal Rules of Criminal Procedure, holding that petitioner acted contemptuously in the presence of the court and summarily adjudging him in contempt. A six months jail sentence was then imposed against petitioner, with leave to him to purge the contempt by appearing and answering the questions before the Grand Jury (R. 45).

I.

Petitioner was deprived of the right to a proper hearing in the district court and an adequate and reasonable opportunity to be heard and to produce evidence to support his claim that the questions put to him would tend to incriminate him.

The proceeding before the district judge at which petitioner was summarily adjudged in contempt followed a procedure devised by the Government attorneys. When petitioner's counsel in the district court asked that he be advised "of the purpose of this hearing or this proceeding" (R. 19), the Government attorney pointed out that the Grand Jury had not voted a contempt citation "nor is it a contempt proceeding for what has actually occurred up to date" (R. 19). Government counsel then stated: "I request at this time that the questions the witness has refused to answer be put to him again by the Court with a request to the witness asking if he intends to answer the questions, at which time a contempt will be committed in the presence of the Court" (R. 19).

Thus it was that the Government attorneys requested that the Judge himself put to petitioner the questions they had selected from petitioner's over-all testimony for the declared purpose of having petitioner commit a contempt "in the presence of the Court."

Petitioner adhered before the district judge to the privilege he had asserted before the Grand Jury. Petitioner's attorney made a number of requests for a hearing to produce witnesses and documents to establish petitioner's justification for the assertion of his privilege against self-incrimination (R. 20, 21, 30, 32). These requests included

a request to furnish an explanation in private in the absence of the press, spectators and the Grand Jury, but either with or without the presence of the Government attorneys. Petitioner's attorney also made 3 separate requests for a complete transcript of petitioner's testimony before the Grand Jury. Notwithstanding these requests, petitioner was summarily adjudged in contempt pursuant to Rule 42(a) for refusal to answer the selected questions put to him by the District Judge. Counsel's request for a hearing, for the transcript of petitioner's testimony and for time to prepare a defense and call witnesses was denied by the judge who stated that the type of hearing sought by petitioner was not necessary, that "the essential facts are rather self-evident" and that the proceeding then in progress was a "summary proceeding" where the contempt has now been committed, not against the Grand Jury, but against the Court (R. 31). The select questions which the district judge put to petitioner were chosen by the Government attorneys, prepared in the form of an exhibit which was handed to the court (Exhibit 3) and read by the court to petitioner (R. 27).

Petitioner's refusal to answer the select questions was treated as wilful misconduct before the trial judge under Rule 42(a). Petitioner argued that he should have been afforded a hearing at which he could produce witnesses and other evidence to support his claim that his invocation of the privilege against self-incrimination was made in good faith. Circuit Judge Medina, writing the opinion of the Court of Appeals below in this case, replied to this argument stating, "No hearing on this phase of the matter was required or necessary; nor could a hearing have served any useful purpose" (R. 109, 234 F. (2) 470, 473).

This, it was contended followed from the fact that the contempt here was a criminal contempt committed in the actual presence of the court, to be punished summarily as provided in Rule 42(a). It is not disputed that petitioner had no hearing in the district court; he was charged with criminal contempt under a procedure chosen by the Government attorneys and summarily adjudged guilty on this charge.

Judge Medina also pointed out that petitioner gave no indication as to who his proposed witnesses would be or what would be the subject of their testimony if a hearing were granted. The district judge did not refuse petitioner a hearing on this ground; rather the refusal to grant a hearing was grounded in the fact that the procedure adopted by the Government attorneys was devised for the purpose of having petitioner commit his contempt in the actual presence of the court, within Rule 42(a) (R. 19).

Moreover, the district judge in effect "dared" petitioner to give an explanation for his refusal to answer the questions. The district judge speculated that petitioner was afraid to give an explanation for fear he would "wake up some morning with his head in a cement block at the bottom of the East River * * * " (R. 34). This was certainly not an atmosphere which encouraged a complete and detailed explanation by petitioner.

The attempted use of Rule 42(a) in this manner appears to be improper. Rule 42(b), with its safeguards of providing for notice and an opportunity for a hearing on a contempt charge, was specifically provided for by the draftsman of the rules as the proper method of procedure in cases of this kind.

The notes of the Advisory Committee on the adoption of the Federal Rules of Criminal Procedure expressly state that Rule 42(a) is substantially a restatement of existing law, citing *Ex parte Terry*, 128 U. S. 289 and *Cooke* v. *United States*, 267 U. S. 517. This Court has restricted the power to punish for contempt without a jury trial, or other proper hearing, to cases only of actual obstruction. *Cooke* v. *United States*, 267 U. S. 517.

In *Ex parte Terry*, 128 U. S. 289, Terry committed assault on the Marshal who was at the moment removing a heckler from the court room. The "violence and misconduct" of both the heckler and the Marshal's assailant occurerd within the "personal view" of the judge, "under his own eye", and actually interrupted the trial of a cause then under way. This Court held that under such circumstances a judge has power to punish an offender at once, without notice and without hearing, although this conduct may also be punishable as a criminal offense. This Court reached this conclusion since it believed that a court's business could not be properly conducted unless it could suppress outbreaks and disturbances within the court room by immediate punishment.

It is clear, therefore, that Rule 42(a) is intended only to cover contempts amounting to actual misbehaviors which occur, not only in the court's immediate presence, but also within the judge's personal knowledge, acquired by his personal observation of the contemptuous conduct. Knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction for criminal contempt without a trial, and without granting the contemnor opportunity to prepare and pre-

sent a defense. This Court said in the case of *In re Oliver*, 333 U. S. 257, 275 (opinion by Mr. Justice Black):

> Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case (267 U. S. 517) requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception of these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all the essential elements of the misconduct are under the eyes of the court, are actually observed by the court, and where immediate punishmen is essential to prevent "demoralization of the court's authority * * * before the public".

This Court held in the same case that "the right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the court's authority'" (333 U. S. 257, 278). Cf. *Sachar* v. *United States*, 343 U. S. 1.

It does not appear to have been the intention of the draftsmen of the rule to permit the summary procedure of Rule 42(a) to be invoked in the case of a witness before a Grand Jury who exercises his privilege against self-incrimination in refusing to answer questions put to him before that body. *Carlson* v. *United States*, 209 F. (2) 209, 214-217 (C. A. 1st). In the *Carlson* case Chief Judge Magruder, writing for the Court of Appeals for the 1st Circuit, discussed the history of the summary contempt

rule, pointing out that the contempt is not complete until a direction by the district judge to the recalcitrant witness is made, with the witness refusing in the presence of the district judge to return to the Grand Jury to answer the questions. However, proper procedure requires that for refusal to answer Grand Jury questions, a witness be given notice before the district judge under Rule 42(b), F. R. Cr. P., of the nature of the proceeding. This notice "shall state the essential facts constituting the criminal contempt charged and describe it as such." Judge Magruder continued:

> If the charge of criminal contempt is that the witness declined to answer the questions upon the pretended ground that the answers would tend to incriminate him, this claim of privilege being advanced in bad faith, then (assuming that such conduct might be deemed misbehavior in the presence of the court within the meaning of 18 U. S. C. §401 (1)), the required notice under Rule 42 (b) would have to describe the alleged misbehavior in order that the witness, in preparing his defense to the charge, may direct his evidence to the issue of his good faith in claiming the privilege (209 F. (2) 209, 216-217).

The cases disclose that the preferred practice is for a written presentment by the Grand Jury to be made seeking to have the witness show cause or otherwise be called upon to answer why he should not be held in contempt for failing or refusing to answer questions put to him before the Grand Jury[1]. The Court of Appeals for the District

1. See, e.g., *United States* v. *Greenberg*, 187 F. (2) 35, 37 (C. A. 3rd) remanded 341 U. S. 944, 192 F. (2) 201, rev'd 343 U. S. 918; *Carlson* v. *United States*, 209 F. (2) 209, 218 (C. A. 1st); *Matusow* v. *United States*, 229 F. (2) 335 (C. A. 5th); *Traub* v. *United States*, 232 F. (2) 43, 46 (C. A. D. C.).

of Columbia Circuit has held that where a district judge arogated to himself the function of putting to the witness some of the questions asked before the Grand Jury, which the witness then refused to answer, the summary contempt adjudged was reversed. *Wong Gim Ying* v. *United States*, 231 F. (2) 776 (C. A. D. C.)[2].

In the instant case the alleged contemptuous conduct was not of such a nature as to come within the category of contempts classified as "disturbing misconduct." While theoretically the offense involved in the instant case is predicated upon the refusal of the petitioner to obey a direction of the district judge to answer certain questions relating to the whereabouts of the books of the local union, an essential element of the offense is a determination of the validity of the district judge's direction in the light of petitioner's rights under the Fifth Amendment. Petitioner's duty to comply with the direction of the district judge depended not upon the mere existence of the court order or direction, but upon the validity of his claim of privilege. A person is not in contempt of court in refusing to answer questions if he rightfully claims his privilege. *Powell* v. *United States*, 226 F. (2) 269 (C. A. D. C.). Whether the petitioner rightfully claimed his privilege would depend upon the determination of a number of questions of fact not within the judge's personal knowledge.

In view of the fact that some essential elements of the offense are not within the personal knowledge of the dis-

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2. At the commencement of the contempt proceeding in this case even the district judge believed a written presentment was necessary to begin the proceeding (See R. 19-20).

trict judge and the district judge must depend upon statements made by others for his knowledge about these essential elements, due process requires that a witness be afforded an opportunity at a hearing to be held for that purpose to come forward with an explanation or evidence in support of the claim that the assertion of the privilege against self-incrimination was made in good faith. The proper rule is described in the cases of *Carlson* v. *United States,* 209 F. (2) 209 (C. A. 1st) and *Wong Gim Ying* v. *United States,* 231 F. (2) 776, 780 (C. A. D. C.). Cf. *Traub* v. *United States,* 232 F. (2) 43, 47-59. These cases clearly demonstrate that the procedure to be followed requires the holding of a hearing and the use of the procedure set forth in Rule 42(b).

The district judge in this case was acting in apparent reliance on the procedure followed in the case of *United States* v. *Trock,* 232 F. (2) 839 (C. A. 2d), when he summarily adjudged petitioner in contempt under Rule 42(a) for wilful misconduct before him. The request made in the district court by petitioner's counsel that the procedure followed in the case of *Carlson* v. *United States,* 209 F. (2) 209 C. A. 1st) be adopted and followed in this case was rejected by the court (R. 21). The Court of Appeals also held that there was no defect in the procedure of this case, stating that it "follows the pattern long in vogue in this circuit" (234 F. (2) 470, 473), citing only the *Trock* decision in that court (232 F. (2) 839). Considering that this Court summarily reversed the *Trock* case (351 U. S. 976), after the decision of the Circuit Court of Appeals in this case it would appear now that this reliance upon the procedure followed there is misplaced. It is to be observed that there was no argument on the merits or

opinion rendered in *Trock*, with this Court's action following the filing of the petition for ceritoriari and the memorandum of the United States in connection therewith only[3].

It has been held that an explanation for the assertion of the privilege under the Fifth Amendment must be given in some more dependable form than the mere statement of counsel as to how the answers will incriminate a witness. *United States* v. *St. Pierre*, 128 F. 2d 979 (C. A. 2d). If it were the duty of the petitioner to furnish this satisfactory explanation, and not simply by argument of counsel, the petitioner was entitled at least as a matter of simple justice to a reasonable opportunity to produce witnesses and documents relevant to the factual issues to be determined. This Court has consistently held that the self incrimination clause of the Fifth Amendment must be liberally construed and not treated as a historical relic to be tolerated. *Hoffman* v. *United States*, 341 U. S. 479; *Quinn* v. *United States*, 349 U. S. 155.

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3. In *United States* v. *Gordon*, 236 F. (2) 916, the Court of Appeals for the Second Circuit reversed a contempt conviction in a case virtually identical with the case at bar. However, in that case, unlike the present one, a hearing was held before the district judge, for which petitioner was allowed an opportunity to prepare his defense. Circuit Judge Frank, writing for the court, held that the summary reversal of *Trock* v. *United States*, 351 U. S. 976, relying solely upon *Hoffman* v. *United States*, 341 U. S. 479, required reversal there. Judge Frank stated that the present case (Curcio) "is distinguishable on its facts," then adding "Besides, that opinion was uttered before the Supreme Court's decision in *Trock*" (236 F. (2) 916, 920). It is submitted that there is no difference at all between these two cases. Circuit Judge Lumbard's concurring opinion in *Gordon* is an attempt to sustain the vitality and validity of the decision of the Court of Appeals in this case, but his statement that the questioning in *Curcio* was limited to the "existence of books and records; their production and their whereabouts is incorrect, in view of the record in this case that the interrogation of petitioner went far beyond these questions.

An opportunity to meet a charge of criminal contempt must be a fair opportunity (Mr. Justice Frankfurter dissenting, *In re Oliver*, 333 U. S. 257, 284). A hearing implies a reasonable opportunity to the accused to introduce evidence relative to the issue. *Hooley* v. *United States*, 209 F. (2nd) 219 (C. A. 1st). The petitioner was denied such an opportunity in this case.

Since a liberal construction in favor of the protection of rights of individuals invariably refers to the procedure to be followed in preserving and implementing these rights, it is clear that any procedure which narrows or detracts from the full and free exercise of these rights ought to be rejected. The substitution of the trial judge as the source of the questions should not authorize or permit the invocation of the summary contempt procedure of Rule 42(a) to cover situations which the rule was not intended to cover. The trial judge becomes the inquisitor rather than the source of the protection of the constitutional rights and guarantees of the individual. This appears to be a new duty or function sanctioned for a federal district judge; and this court, in exercising supervisory jurisdiction in criminal cases over lower federal courts, should disapprove and disavow any such new practice.*

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4. What happens to the usual presumption of innocence and the burden of proof in a summary proceeding under Rule 42(a)? See *Mason* v. *United States*, 244 U. S. 362, 365; *Hoffman* v. *United States*, 341 U. S. 479, 486-487. See also, *Quinn* v. *United States*, 349 U. S. 155, 162, where Chief Justice Warren stated that the respect normally accorded the privilege against self-incrimination in a contempt proceeding would then be buttressed by the presumption of innocence accorded a defendant in a criminal trial. Is this presumption to be eliminated because the Assistant United States Attorney chose to proceed under Rule 42(a) and have the questions put to petitioner by the district judge in open court?

The Solicitor General has taken an entirely different approach to the problem in this case from that of the United States attorney and the Court of Appeals. He states that no hearing was required here, since there was no question of fact to be determined on this record; that petitioner's claim of privilege was directed solely to his status as custodian of union books and records and that as to such status petitioner has no privilege. In this change of position by the Government the fact is overlooked or ignored that petitioner was served with two subpoenas, one personal subpoena and one subpoena *duces tecum* as custodian of records (R. 47-49). This question will be discussed under Point III of this brief.

II.

The failure to require the Government to furnish petitioner with a transcript of his appearance before the Grand Jury prior to adjudging him summarily in contempt was error.

At the commencement of the proceeding before the district judge, petitioner made a request for a transcript of the testimony before the Grand Jury. The Assistant United States Attorney stated that the Government was not required at this point to turn over to the witness a transcript of his testimony before the Grand Jury (R. 4). The district judge agreed with the statement by the Assistant United States Attorney (R. 5). Later in the proceedings, petitioner's counsel again repeated his request on different occasions for a complete transcript of the Grand Jury testimony (R. 20, 30). These requests were denied. It was only after the petitioner was adjudged

guilty of contempt that a complete transcript of petitioner's appearances before the Grand Jury was released and filed "and deemed part of the record on appeal." (R. 103-104).

The Grand Jury testimony was, of course, relevant for it threw considerable light on the purpose and nature of the inquiry and the relationship between the 15 questions selected as the basis for the summary contempt proceeding and the more than 200 other questions.

Neither the district judge nor the petitioner had a copy of the entire interrogation before the Grand Jury and petitioner was not able to demonstrate that his invocation of the privilege against self-incrimination was in good faith. This procedure failed to follow the practice heretofore established in the Second Circuit in the case of *United States* v. *Zwillman*, 108 F. (2) 802, 803, where Judge Augustus N. Hand wrote as follows:

> It is true that the government was not obliged to disclose the testimony before the Grand Jury or to state the purpose of the inquest or whether prosecution of the defendant was proposed. But if it chose to adopt such an attitude and to confine the defendant's defense only to showing that the questions asked were incriminating on their face, it could not put him in contempt for declining to answer so long as it prevented him from adducing evidence that might demonstrate that his answers were likely to form vital links in the proof of a conspiracy in which he was involved. In the present case the government prevented him from showing that his answers would tend to incriminate him and thereby deprived him of his right to a proper trial where he could offer evidence in his defense.

Judge Medina calls attention in his opinion in this case to the fact that the *Zwillman* case does not support petitioner's contentions here, since *Zwillman* concerned an alleged contempt before the Grand Jury and not in the presence of the court (R. 109). Zwillman's precise contention was that examination of his complete interrogation before the Grand Jury would disclose that his claim of privilege under the Fifth Amendment was made in good faith. It was for the purpose of making such a showing that Zwillman urged that the government be required to furnish him with a complete transcript of his appearance before the Grand Jury. The Court of Appeals sustained that contention, and its decision in this regard has never been doubted until the present case.

Petitioner's request for a complete copy of the transcript of his appearance before the Grand Jury is identical with the request made in the *Zwillman* case and for precisely the same purpose. It is apparent that the setting in which the court below treated petitioner's argument that he be furnished a complete transcript of his appearance before the Grand Jury was both the fact that the alleged contempt was one committed in the actual presence of the district court and that petitioner's testimony before the Grand Jury was not part of that proceeding. The court treated the questions put to petitioner by the district judge as standing alone, without connection or reference to the Grand Jury interrogation. Judge Medina states in his opinion: "The full record of what occurred has been released and is on file, but is not part of the record before us" (R. 105, 234 F. (2) 470, 472). There is no doubt that the complete transcript of petitioner's appearance before the Grand Jury was physically a part of the Government's

appendix in the Court of Appeals, just as it is part of the transcript of record in this court (R. 61-102). Contrary to Judge Medina's statement in his opinion, the full record of what occurred before the Grand Jury was part of the record before the Court of Appeals, having been made such by the order of Judge Noonan in the district court (R. 103-104).

It has always been understood that proper contempt procedure, in conformance with the requirements of due process of law, required that the contemnor be given every reasonable opportunity to prepare his defense to such proceeding. Minimal requirements of due process would seem to require that for this purpose a witness have made available to him all relevant data and other evidence which may exist to enable him properly to prepare his case. It would seem that following this court's decision in *Hoffman* v. *United States*, 341 U. S. 479, the liberal application of the rules of due process, in harmony with the rights secured under the Fifth Amendment to the Constitution, would be afforded to every witness before a Grand Jury who invokes the privilege against self-incrimination in refusing to answer questions put to him.

It was no fanciful or "mere vague and belated demand" (R. 110, 234 F. (2) 470, 473) which this petitioner asserted in seeking to be furnished with the proof necessary to demonstrate that his invocation of the privilege against self-incrimination was in fact in good faith. The complete transcript, which is part of the record in this court, as it was before the Court of Appeals (although that court declined to consider that it was), clearly demonstrates that the broad searching interrogation of this petitioner was

mainly concerned with his alleged association with criminals and racketeers.

The transcript of petitioner's appearances before the Grand Jury shows that among the questions petitioner was asked were the following:

> Q. You know John Dioguardia? A. I refuse to answer on the grounds it may tend to incriminate me.
>
> Q. Have you had conversations with John Dioguardia since this past Monday? A. I refuse to answer on the grounds that it may tend to incriminate me (R. 83).
>
> * * * * *
>
> Q. Did John Dioguardia order you not to come down, or, rather, order you not to produce the books and records of Local 269? A. I refuse to answer on the grounds it may tend to incriminate me.
>
> Q. Have you seen John Dioguardia since Monday past? A. I refuse to answer on the grounds it may incriminate me.
>
> Q. Do you know John O'Rourke? A. I refuse to answer on the grounds it may tend to incriminate me.
>
> * * * * *
>
> Mr. Perotta: Mr. Foreman, may I request that he be directed to answer whether or not he knows John O'Rourke?
>
> Foreman: You are directed, Mr. Witness, to answer the question, do you know or do you not know John O'Rourke?
>
> Witness: I refuse to answer on the grounds it may tend to incriminate me" (R. 84).

It was shortly after this colloquy that petitioner asserted:

> "Witness: They're leading up to something. Well, I would like to know what to do" (R. 85).

Then the questioning continued, during the course of which petitioner was asked:

> "Q. Mr. Curcio, do you know someone by the name of James Hoffa? A. I refuse to answer on the grounds that it may tend to incriminate me" (R. 88).

Further on, petitioner was asked whether he knew several other persons (R. 94, 95), and as to each such inquiry he asserted his privilege.

The record discloses that Messrs. Hoffa, O'Rourke, Dioguardia and others were alleged racketeers and criminals (R. 56-59). And thus it becomes clear that the purpose of petitioner requesting a complete transcript of his appearance before the Grand Jury was to show that his invocation of the privilege against self-incrimination was made in good faith; that it was the assertion of a personal privilege in response to questions as to his alleged association and relationship with these alleged criminals and racketeers.

In his opinion below, Judge Medina calls attention to the fact that petitioner "was in constant consultation with his counsel during the entire period of his appearance before the Grand Jury on April 12th, and it is reasonable to suppose that counsel would have directed the attention of the court to any part of such interrogation which might be claimed to support the alleged privilege, as was done in the *Zwillman* case. Mere vague and belated demands such as we have in this record are plainly insufficient" (R. 110, 234 F. (2d) 470, 473). Judge Medina's view implies that petitioner remembered approximately 225 questions and that his counsel could have directed the attention of the court to that part of the interrogation which might

be claimed to support the asserted privilege. This would seem to place an intolerable burden on a witness while perverting the constitutional protection against self-incrimination. See *United States* v. *Zwillman*, 108 F. (2d) 802 (C. C. A. 2d).

It is respectfully submitted that petitioner's counsel had no precise knowledge of the questions put to petitioner before the Grand Jury and his ability to point to any particular question at any hearing before the district court was curtailed by such lack of knowledge. Counsel asked for time to prepare to defend the contempt charge, with a copy of the transcript of petitioner's testimony being furnished for the purpose of such preparation. The district judge did not decline to have such transcript furnished for the reason stated by Judge Medina that petitioner was in "constant consultation with his counsel during the entire period of his appearance before the grand jury" and thus was presumed to know what transpired in the Grand Jury room. The district court's decision rested solely on the premise that a contempt was being committed in the presence of the Court authorizing summary disposition under Rule 42(a).

It is apparent that this argument by Judge Medina loses sight of the fact that if the hearing before the district judge was the hearing required under Rule 42(b), that counsel should have been furnished a transcript of petitioner's appearance before the Grand Jury and accorded time to prepare for such hearing. This would have been an adoption of the proper procedure described in the *Carlson* and *Zwillman* cases, and a rejection of the discredited procedure of the *Trock* case. The rights of a per-

son to present an adequate defense should not depend upon the particular procedure selected by the Assistant United States Attorney.

III.

Petitioner's claim of privilege against self-incrimination was proper and should have been sustained. It was the exercise of a personal privilege, not as custodian of union books and records.

Underlying the entire proceeding in the district court is the fact that petitioner's claim that his exercise of the privilege against self-incrimination was the exercise of a personal privilege in response to questions concerning his connection or relationship with alleged racketeers and criminals. The transcript of petitioner's appearances before the Grand Jury clearly discloses that intermingled with questions as to petitioner's knowledge of the whereabouts of union books and records, were a great many questions touching upon his criminal associations and connections. The transcript of record in this case clearly supports this contention (R. 61-102).

Basic to any argument that a particular procedure fails to comport with minimal standards of due process, such as in the conduct of a hearing, or in the type of hearing afforded, and in the furnishing of a litigant with the data and evidence required by him properly to prepare to meet the issues arising in the proceeding, is the requirement that a litigant shall have a proper claim touching the merits of the case.

The record in this case clearly establishes that petitioner's fears or apprehension that the questions put to him before the Grand Jury and the select questions put to him by the district judge were calculated to elicit respon-

sive answers, or an explanation of why these questions could not be answered, which might be dangerous to petitioner, because injurious or incriminatory disclosure would follow.

The setting of the case was such that the petitioner could reasonably have feared that he was not only to be thoroughly investigated, but that he was to be prosecuted. The newspaper clippings, magazine articles and other widely distributed data, all of which are part of the record here and in the Court of Appeals (R. 51-60), containing news releases by the Government's attorneys, disclose that a thorough investigation was in progress before the Grand Jury of seven recently chartered local unions of the International Brotherhood of Teamsters. It was publicly charged that these locals, including the one of which petitioner was secretary-treasurer, were controlled by well known gangsters, ex-convicts and labor racketeers (R. 51-60). The United States Attorney had examined prospective jurors for the Grand Jury as to their knowledge of and acquaintance with John DiGuardia, described as a "labor racketeer convicted of extortion", and allegedly president of Local 269, of which petitioner was secretary-treasurer (R. 56).[5]

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5. The newspaper clippings which appear on pages 51-60 of this record were printed as part of the Appendix to Petitioner's Brief in the Circuit Court of Appeals. See *Hoffman* v. *United States*, 341 U. S. 479. They were not before the district judge, although they would have been submitted if an opportunity had been given to the petitioner to present such evidence at a hearing. The alleged association between the petitioner and John Diguardi was enough to furnish sufficient weight and credibility to the suggested connecting chain of incriminating evidence justifying the petitioner in exercising his privilege. *United States* v. *Coffey*, 198 F. (2d) 438, 440 (C. A. 3rd). It has been held that a court can take judicial notice of these background facts. *United States* v. *Costello*, 222 F. (2d) 656, 661 (C. A. 2nd).

In view of the above general background, the petitioner certainly could reasonably have sensed the peril of prosecution for a wide variety of federal offenses, including the Anti-Racketeering Act, the act prohibiting conspiracies to violate the laws of the United States, and conspiracies to obstruct justice.

We know that in a war an artillery barrage would precede an attack by an army. The opposing army by reason of this barrage would have good reason to believe it was about to be attacked. Certainly with this barrage of publicity (R. 51-60) which preceded the investigation by the Government and the service of the subpoenas in this case, this petitioner had good grounds for fear that he was going to be attacked personally or at least be the subject of a "hunt" for violations of the criminal laws of the United States.

The subpoenas served upon petitioner called for personal testimony, not merely testimony as a custodian of books and records (R. 47-49). The numerous questions asked of petitioner included many questions touching his relationship with these criminal persons and his exercise of his privilege as to all questions was grounded in a fear that the Government was "leading up to something" (R. 85). The Solicitor General contends that the questions put to petitioner were put to him only in his representative capacity as the normal custodian of the union's books and not as an individual. The record in this case discloses that this is not so.

The interrogation of petitioner as to his alleged association with criminals and racketeers (R. 84, 88) would seem to be grounded in some knowledge on the part of the Gov-

ernment that he was in fact associated with these persons, or it was part of a search for evidence leading to an inference that such was the case. If petitioner were allegedly associated with criminals or if his interrogation was designed to compel him to furnish evidence of such association, then it is clear that his invocation of the privilege against self-incrimination was proper.

On the merits, this case turns on this Court's decision in *Hoffman* v. *United States*, 341 U. S. 479. See, also, *United States* v. *Doto*, 205 F. (2d) 416 (C. A. 2nd); *United States* v. *Weisman*, 111 F. (2d) 260 (C. A. 2nd); *United States* v. *Zwillman*, 108 F. (2d) 802 (C. A. 2nd); *United States* v. *Cusson*, 132 F. (2d) 413 (C. A. 2nd).[6]

It is no answer to say that the 15 questions chosen as the basis for a contempt conviction relate only to the whereabouts of the union books and records. These 15 questions were part of a series of approximately 225 questions. It would certainly be a new approach to avoid the effect of this Court's decision in the *Hoffman* case by permitting the Government not only to choose the type of procedure but to select and isolate certain questions out of context of a series of questions. Can an Assistant United States Attorney justify a contempt proceeding by the expert use of scissors and choose questions which look harmless on their face when separated from other questions, which are obviously incriminatory in nature?[7]

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6. See this Court's action in *Greenberg* v. *United States*, 343 U. S. 918; *Singleton* v. *United States*, 343 U. S. 944.

7. Wolfram, *Peril, Pursuit and the Privilege against Self-incrimination: The Problem of the Apparently Innocuous Questions*, 5 Syracuse Law Review 127 (1954).

To label the questions put before petitioner by the district judge as "auxiliary questions relating to the location and production of such records" is an over-simplification of a constitutional question. Petitioner was not required to stand by and let his interrogators "pick out one, and say, if that be put, the answer will not incriminate him" (*Foot* v. *Buchanan*, 113 Fed. 156, 161; *United States* v. *Rosen*, 174 F. (2d) 187; *Poretto* v. *United States*, 196 F. (2d) 392, 396; *People* v. *Newmark*, 312 Ill. 625).

The Solicitor General takes the position in this case that the constitutional and legal questions involved may be considered in a sort of isolation booth completely oblivious to the nature of the Grand Jury investigation and the totality of the questions asked the petitioner. The Government relies upon this Court's decision in *United States* v. *White*, 322 U. S. 694, as the source of its argument that petitioner, as custodian of union books and records, had no privilege in relation to them. Petitioner asserted no privilege as custodian of union books and records; and he having testified at the outset of his interrogation before the Grand Jury that he did not have these books and records, the *White* case is not applicable.[8]

Nor may the select questions be treated as "auxiliary questions" touching upon petitioner's knowledge of the whereabouts of the union books and records, since this interrogation would necessarily involve petitioner disclosing the extent of his relationship with persons claimed by the Government to be racketeers and criminals. Petitioner would then be open to a charge of having conspired with

8. The case of *Rogers* v. *United States*, 340 U. S. 367, is not in point since the sole question before the Court there was that petitioner's waiver of the privilege against self-incrimination.

these criminals and racketeers to obstruct justice. *Bosselman* v. *United States,* 239 Fed. 82 (C. A. 2nd); *Heinze* v. *United States,* 181 Fed. 322 (C. A. 2nd). See *United States* v. *Patterson,* 219 F. (2d) 659, 661 (C. A. 2nd), where the Court of Appeals pointed out that the district judge sustained the privilege of a witness to refuse to answer as to the whereabouts of certain books and records on the ground that testimony as to the destruction of books and records might lead to his prosecution for violation of Section 145(b) of the Internal Revenue Code and evasion of the tax laws. See also, the very recent decision in *Bradley* v. *O'Hare,* 2 App. Div. 2nd 436, where a New York court held a witness was privileged for refusing to answer questions as to the whereabouts of union books and records.

In the case of *United States* v. *Austin-Bagley Corp.,* 31 F. (2d) 229 (C. A. 2nd), certiorari denied, 279 U. S. 863, the question involved was the compulsion of corporate officers to produce and identify on a criminal trial corporate books and records which contained evidence against said officers. The Court of Appeals held that these defendants had no privilege in said books and records, and "that testimony auxiliary to the production (of said records) is as unprivileged as are the documents themselves" (31 F. (2d) 229, 234). This is certainly a different situation from testimony as to possible criminal associations and connections which may be determined from exploratory questions touching petitioner's knowledge of the whereabouts of union books and records.

Judge Medina's comment that counsel seems to suppose "that notorious criminals, racketeers and unsavory char-

acter generally have an open sesame to the privilege guaranteed by the Fifth Amendment" (234 F. (2d) 470, 474) is not a proper comment. Counsel supposes nothing of the sort. The rulings of this Court and other courts require that any assertion in good faith of the privilege against self-incrimination, whether by an alleged criminal, communist, conscientious objector or any other person, is to be respected and is not to be deprecated, impugned, narrowed or struck down.

The order adjudging petitioner Joseph Curcio guilty of contempt should be reversed and judgment of acquittal be ordered entered. *Bryan* v. *United States*, 338 U. S. 552, Rule 29, F. R. Cr. P.

CONCLUSION

It is, therefore, respectfully submitted that the judgment of the court below should be reversed and that judgment of acquittal be entered.

Respectfully submitted,

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October Term, 1956

No. 260

JOSEPH CURCIO,

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—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner respectfully submits this brief in reply to arguments made by the Solicitor General in his Brief for the United States.

The Government asserts that the basic issue before the district court, and consequently before this Court, is a "general legal one". This issue is defined as the privilege against self-incrimination of a custodian of union records who has not produced the union's books pursuant to subpoena and who thereafter asserts a personal privilege with respect to questions touching upon his knowledge of the whereabouts of said books. Thus, the Government seeks to narrow sharply the limits of the issue before this

foregoing basic premise that petitioner's assertion of a personal privilege was in fact only that of a custodian of books and records who, as such, had no such privilege.

Contrary to the opinion of Judge Medina in the Court of Appeals, the Government does not claim now that if petitioner had a personal privilege that he did not fail to make an adequate showing of possible self-incrimination.

The sole issue before the district court was the question of fact of how petitioner's answers to the select questions could possibly incriminate him. The decision of the district court, acting as both judge and jury, was that the answers to the select questions could not possibly incriminate petitioner. It is now as an afterthought that the Government asserts for the first time that petitioner had no privilege with respect to these questions and that the issue is only an issue of law before this Court. It thus appears that the Government is seeking to affirm the judgment of conviction of the district court on a theory materially different from that on which the case was presented to the district court and to the Court of Appeals. This they may not do (*Cole* v. *Arkansas*, 333 U. S. 196, 202).

Moreover, petitioner contends that the issue cannot be narrowed to the extent sought by the Government, since the effect of such tactics would be to vitiate petitioner's arguments that due process required that he be given a fair hearing in the district court, with an adequate opportunity to produce evidence and witnesses in support of his claim that any answers he might give respecting his knowledge of the whereabouts of the union books and records would be incriminatory; and that the selection of 15

questions from among several hundred, removed from the context in which they were originally asked, without furnishing petitioner a complete transcript of his testimony before the Grand Jury, would result in a derogation of his constitutional rights under the Fifth Amendment.

Petitioner testified before the Grand Jury that he did not have in his possession or under his control any of the books and records called for at the time he was served with the subpoena *duces tecum* (R. 67). Petitioner at no time asserted that he had a privilege by virtue of his being a custodian of union books and records. The privilege he asserted was a personal privilege with respect to the questions touching upon his knowledge of the whereabouts of the union books and records. It is a matter of significance that petitioner received two subpoenas requiring his attendance before the Federal Grand Jury; one subpoena *duces tecum* requiring the production of union books and records (R. 48-49), and one personal subpoena (R. 47). Both subpoenas required petitioner's testimony with respect to "an alleged violation of Section 371, Title 18 U. S. C." (R. 47).

Each of the cases relied upon by the Government in its Brief are based upon factual situations quite different from the facts in this case. In nearly all of these cases the contemnor refused to produce books and records in response to subpoenas *duces tecum* only. The varying reasons given in the various cases for these refusals were based upon arguments that the records contained incriminatory matter, or that they would incriminate others besides the contemnor. In one instance the Court's decision rested on a holding that the contemnor had waived the

privilege against self-incrimination by giving some testimony with respect to books and records which had not been produced (*Rogers* v. *United States*, 340 U. S. 367).

It is to be noted that in the case of *Wilson* v. *United States*, 221 U. S. 361, the petitioner refused to produce corporate books and records in response to a subpoena *duces tecum* on the ground that said books contained matters which would incriminate him personally. The Court, by Mr. Justice Hughes, pointed out that petitioner had no privilege with respect to corporate books and records and then stated (p. 377):

> "There is no question, of course, of oral testimony, for he was not required to give any."

Thus, it is apparent that the ground of the Court's decision affirming a commitment for contempt was that petitioner as custodian had no privilege to refuse production of corporate books and records although their contents tended to incriminate him. No personal questions or personal interrogation was required or sought under the terms of the subpoena *duces tecum* served upon petitioner. This is far different from this case. The *Wilson* case is the fountainhead of authority on this subject and the case basic to the Government's proposition that as a matter of law petitioner had no personal privilege with respect to the production of union books and records.

In *United States* v. *White*, 322 U. S. 694, a subpoena *duces tecum* only was served on petitioner, and following the reasoning in the *Wilson* case the court held that a custodian of union books and records, similarly to a custodian of corporate books and records, had no personal privilege

with respect to such records and could not *refuse* to produce these records. But in no instance did these cases turn upon testimony relating to the assertion of a personal privilege as to questions touching the petitioners' knowledge of the whereabouts of such records.

We acknowledge the general rule of law that a custodian of union books or corporate records cannot complain if these books and records contain entries which might incriminate him. In those instances the books furnish the incriminating evidence and not the verbal testimony of the witness. We do contend, however, that this Court has always construed the Fifth Amendment broadly on the ground that compelling a person to convict themself is "contrary to the principles of a free government and abhorrent to the instincts of an American."

In the instant case, the Government loses sight of the fact that this petitioner was served with two separate subpoenas. Thus he was subpoenaed both personally and as an officer of the union to testify to certain matters. The sweeping and thoroughgoing interrogation of petitioner cannot be dissected and fitted into separate groups, and say that as to some questions there was a question of fact, and as to others the petitioner in his capacity as a custodian had no privilege because as a matter of law he was obliged to answer the questions though they might incriminate him. We cannot see how the hunt for possible violations of law against this petitioner could be so split up.

The Government states, at page 35 of its Brief, that if petitioner had a personal claim of privilege in regard to the questions, the possibility of self-incrimination existed under the rule of *Hoffman* v. *United States*, 341 U. S. 479.

In view of this concession, we cannot see how you can make this concession in one breath and then disregard it completely and claim that petitioner had no privilege.

An examination of the complete interrogation of petitioner on his several appearances before the Grand Jury concededly discloses that petitioner was asked a great many questions not touching upon his knowledge of the whereabouts of the union books and records. It was in this setting that petitioner exclaimed:

> "The Witness: They are leading up to something; well, I would like to know what to do." (R. 85)

The removal of the proceeding from the grand jury room to the district court room should not be permitted to act as the lever whereby constitutional rights may be transformed at the election of the Assistants United States Attorney in charge of this case. Moreover, we cannot see how petitioner can be adjudged guilty of contempt on the ground that the questions were not incriminating; then, on appeal, concede that the questions were incriminating but claim that petitioner had no privilege in respect thereto.

The Government suggests that the select questions asked petitioner required his answer since they were merely auxiliary questions properly put in view of petitioner's status as custodian of the union books and records. The Government argues, at page 28 of their Brief, that petitioner could have been convicted "not for failure to answer questions as to the books' whereabouts, but simply for failure to produce them". Such conviction could be established *prima facie* by proof of service of a valid subpoena *duces tecum* upon petitioner requiring the production of

books and records within his control and his failure to produce these books and records. In support of this argument the Government cites the cases of *United States* v. *Bryan*, 339 U. S. 323, and *Lopiparo* v. *United States*, 216 F. 2d 87 (C. A. 8), cert. denied 348 U. S. 916. In the *Bryan* case the facts were that the petitioner "admitted that the records were in her possession but refused to comply with a subpoena" (p. 325). In the *Lopiparo* case the defendant had been served with a subpoena *duces tecum* as a corporate officer which directed his production of corporate books and records. In response to the question as to whether he had brought the books for the year 1953 with him, defendant claimed a personal privilege and refused to answer any questions about the corporate books. Thereafter, the defendant attempted to find the books but was unable to do so. At a final hearing before the Grand Jury defendant refused to answer questions touching on his knowledge with respect to these records. When asked by the court as to the materiality of his background with respect to the production of the corporate books he, through counsel, attempted to show that he was reputed to be a gangster and notorious underworld character and that he had been interrogated by the Kefauver Committee. The district court did not believe defendant's testimony that he was unable to find the books he was ordered to produce, and the Court of Appeals held the evidence sufficient to sustain the contempt order, with one judge dissenting.

It is to be noted that the Court of Appeals for the District of Columbia Circuit, in the case of *Traub* v. *United States*, 232 F. 2d 43, specifically stated that it refused to follow the *Lopiparo* case (see fn. 14 at 232 F. 2d 43, 48). In the *Traub* case petitioner failed to produce certain rec-

ords before the Federal Grand Jury. He stated that he did not have them in his possession or under his control at the time the subpoena *duces tecum* was served upon him. Nevertheless, he was held in contempt by the court below and on appeal this conviction was reversed and a judgment of acquittal ordered entered. Circuit Judge Bazelon, writing for the Court of Appeals, stated the issue as follows:

> The Government's brief states that the specific question discussed "is the *only* question which appellant is charged with contempt for failing to answer." Yet, it urges, appellant's refusal to answer other questions relating to the existence and location of the missing records is a ground for sustaining the present conviction. The Government explains the apparent inconsistency in its position by the following novel contention: A witness who fails to produce all the papers listed in a subpoena is guilty of contempt unless he demonstrates that he is acting in good faith. This demonstration of good faith requires that he answer questions relating to the existence and location of papers he has not produced even though the answers will incriminate him. In other words, the witness can choose his own brand of hemlock. He can destroy himself either by failing to produce records called for by a subpoena (even if they were not in his possession or control when the subpoena was served); by refusing to answer questions (even if he has claimed the protection of the privilege and there has been no judicial determination that it is not available); or by giving incriminating answers. This view is plainly untenable (232 F. 2d 43, 48)

In conclusion, petitioner desires to reiterate the fundamental proposition that constitutional rights cannot be

decided in vacuum; that they must be broadly construed to afford the maximum protection for individuals who are potential criminal defendants. Any narrowing, restriction or other impairment of constitutional rights of one individual is a destruction of the rights of all (*United States* v. *Gordon*, 236 F. 2d 916, 920). For all of the foregoing reasons, the judgment of the court below should be reversed and a judgment of acquittal ordered entered in favor of petitioner.

Respectfully submitted,

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March 1957.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 260

JOSEPH CURCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 27–37) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1956 (Pet. 27). A petition for rehearing was denied on June 22, 1956. The petition for a writ of certiorari was filed on July 18, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner, Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters, was sub-

poenaed to appear before a grand jury, investigating racketeering in the garment and trucking industries, and to produce the books and records of the union. He did not produce the books and records, said he did not have possession of them, and declined on the ground of self-incrimination to answer any questions pertaining to their whereabouts. The District Court ruled, after a hearing in which petitioner attempted to justify his claim of privilege, that the privilege did not attach to these questions and ordered him to answer. The petitioner refused to answer, even when the court itself put the questions to him, and the court summarily cited him for contempt under the authority of 18 U. S. C. 401 (3) and the procedure of Rule 42 (a) of the Federal Rules of Criminal Procedure. The questions presented are:

1. Whether the District Court properly held that the privilege against self-incrimination did not attach to questions relating to the whereabouts of the books and records of a union of which petitioner was secretary-treasurer.

2. Whether, in these circumstances, the District Court committed reversible error in not granting petitioner's request, two days after the hearing in which the court ruled on his claim of privilege, for time to produce witnesses and documents in support of his claim of privilege.

3. Whether, in these circumstances, the District Court was required to furnish petitioner's counsel with a transcript of the entire grand jury testimony before ruling on the claim of privilege.

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

United States Constitution, Amendment V, provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

18 U. S. C. 401 provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42, Federal Rules of Criminal Procedure, provides:

> (a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) *Disposition Upon Notice and Hearing.* A criminal contempt, except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open

court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

On April 19, 1956, in the United States District Court for the Southern District of New York, Judge Gregory F. Noonan cited petitioner for contempt of court under the authority of 18 U. S. C. 401 (3) and in accordance with Rule 42 (a) of the Federal Rules of Criminal Procedure (*supra*, p. 3). Petitioner was ordered confined for six months, with the proviso that he could purge himself of the contempt by answering the questions he had been directed to answer (A. A. 41–42).[1]

This contempt citation grew out of the following circumstances:

On April 10, 1956, in answer to a subpoena to appear before a grand jury in the Southern District

[1] "A. A." designates the Appellant's Appendix in the Court of Appeals, which is a part of the record filed in this Court. Appellee's Appendix in the Court of Appeals, also filed as part of the record, will be referred to by the symbol "G. A."

of New York and testify to all he knew with regard to an alleged violation of the federal-conspiracy statute, 18 U. S. C. 371 (A. A. 47), petitioner appeared but declined to answer certain questions until he had consulted his attorney (G. A. 2–7). He was excused and ordered to return on April 12, 1956, with the books and records of Local 269 of the International Brotherhood of Teamsters which had been demanded in the subpoena duces tecum (A. A. 48–50) already served on him in his official capacity as secretary-treasurer of the union (G. A. 7).

On April 12, 1956, petitioner appeared with three persons, two of them attorneys (G. A. 9, 44), who stayed in an anteroom while petitioner testified before the grand jury, and with whom petitioner consulted frequently, with the permission of the grand jury foreman.[2] Petitioner stated that he was the

[2] Petitioner consulted his attorney when asked the following questions:

"In whose possession are those records?" (G. A. 9–10). After consultation, petitioner declined to answer on the ground that it might incriminate him (G. A. 10).

"You've been an officer of other labor unions?" (G. A. 11). After consultation, petitioner replied that he had (G. A. 11).

"In your experience as a labor union officer, would you say that it's usually a function of the secretary-treasurer of a local to maintain custody of books and records?" (G. A. 11–14). After consultation, petitioner declined to answer on the ground of incrimination (G. A. 14–15).

"Did you, of this other labor union, have custody of the books and records?" (G. A. 15–16). After consultation, petitioner claimed privilege (G. A. 16). After the foreman directed petitioner to answer this question, he again consulted his attorney for four minutes (G. A. 17–18) and then answered that he did (G. A. 18).

"Referring to Local 269 of the International Brotherhood of

Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters (G. A. 10); that the union had books and records to his knowledge (G. A. 19); that he had seen them (G. A. 31); but that they were not in his possession (G. A. 20). He refused, on the ground of self-incrimination, to state what kind of books they were (G. A. 21); whether he ever had custody of the books (G. A. 22); where the records were at specific times (G. A. 24, 25, 32, 33); whether John DioGuardia had ordered him not to produce the books (G. A. 30); and who had possession of the records at that time (G. A. 33). He was warned that refusal to answer proper questions would constitute contempt (G. A. 34). He was then excused with instructions to return on April 17, 1956 (G. A. 44).

On April 17, 1956, petitioner, accompanied by his attorney, Mr. Arnold Cohen, who had also accompanied him on April 12th to the grand jury hearing, reappeared before the grand jury and declined, again on the ground of self-incrimination, to answer any of the following questions, which were a portion of the

---

Teamsters, to your knowledge are there any books and records of this local?" (G. A. 18-19). After a consultation of four minutes, petitioner replied that there were (G. A. 19).

"To your knowledge where were the records of Local 269 a week ago today?" (G. A. 24). After consultation for five minutes, petitioner claimed the privilege (G. A. 24).

"Mr. Curcio, do you know a James Hoffa who is Vice-President of the International Brotherhood of Teamsters?" (G. A. 36). After consultation, petitioner claimed the privilege (G. A. 36).

"What printer did you order those letterheads from?" (G. A. 39). After consultation, for over five minutes, petitioner answered the question (G. A. 40).

questions which had been asked at the April 12th hearing (G. A. 45–50):

I am going to ask you some questions, including some that were put to you on Thursday which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records?

* * * * *

Mr. Curcio, have you ever had possession of the books and records of this local?

* * * * *

Did you have custody and control of these records last Thursday?

* * * * *

Do you have possession of those records or any of them today?

* * * * *

Do you have custody and control of any of these records today?

* * * * *

Where are any of those records today, if you know?

* * * * *

Who has any of those records today, if you know?

* * * * *

Where were any of these records or all of these records a week ago Thursday?

* * * * *

Where were any or all of these records a week ago Saturday?

* * * * *

Where were any or all of these records a week ago yesterday, Monday?

* * * * *

Where were any or all of these records this past Thursday?

* * * * *

Where are any or all of these records today?

* * * * *

Who, if you know, had any or all of these records a week ago Saturday?

* * * * *

Who had any or all of these records a week ago yesterday?

* * * * *

Who has any or all of these records today?

* * * * *

The grand jury recessed and reconvened later the same day before District Judge Noonan, at which time petitioner was asked the same questions he had previously refused to answer that morning, was directed by the foreman of the grand jury to answer them, and declined to do so on the ground of self-incrimination (A. A. 3–9). Petitioner's counsel asked for and was denied a transcript of the grand jury testimony (A. A. 4–5). The Assistant United States Attorney gave Judge Noonan the background of petitioner's refusal and Judge Noonan then asked petitioner's attorney, Mr. Cohen, just how the answering of these questions posed on April 17th would incriminate petitioner (A. A. 10). Mr. Cohen gave the following explanation (A. A. 10–11):

The witness, I have been informed, did at one time answer questions that he did not have

possession of the books and records. That certainly takes care of the subpoena duces tecum which was served upon him. Any other question relating to "Did you ever have possession" or "Do you know who has possession" I feel that his privilege goes to these questions and answers, because the nature of the investigation before the Grand Jury, if we are to try to get our information from the press, is to investigate racketeering in trucking and food local unions.

In addition to that, we have here a civil action which is now being litigated, I think, on the 15th floor of this court.

Insofar as the nature or purpose of any investigation by the Grand Jury relating to those questions, the defendant in many ways could be tied in, not being able to find out or determine or not being permitted to find out or determine the nature of the investigation in question, and he has the right, if in his mind he believes that the answer might incriminate him, to assert the Fifth Amendment to protect himself. I am telling the Court in good conscience that he is asserting the Fifth Amendment because in his mind there is some doubt as to whether or not any of these answers might incriminate him by conspiracy, by association, or by any other subsequent action that the United States Attorney's office might start.

After the court stated that the showing was insufficient to support the claim of privilege (A. A. 13), Mr. Cohen explained further (A. A. 14):

I believe that to some extent the investigation, as far as I have been informed by my client, by the jury, is going into the internal affairs of a

> labor organization. I believe if there is any suspicion, proof or reason to believe that any labor organization or any official of any labor organization has committed any crime, they should be vigorously prosecuted. But I also feel that the United States Attorney's office should not be used to go into the internal affairs of a labor organization and to ask questions that are not material or relevant to the purposes of convenience of this noble and honorable Grand Jury for the purpose of possibly establishing something which is the subject of litigation in another part of this building.

The court then informed petitioner that his claim of privilege was improperly exercised and directed him to return to the grand jury room and answer the questions just put to him before the court (A. A. 15). Neither petitioner nor his counsel asked for additional time to produce witnesses or documents in support of the claim.

On April 19, 1956, petitioner again appeared before the grand jury and declined to answer the questions he had been directed to answer by the court on April 17th (A. A. 18–19). He was then brought before Judge Noonan again, and, in the presence of the grand jury, Judge Noonan asked him the same questions he had previously been directed to answer. Petitioner declined to answer on the ground of self-incrimination (A. A. 26–28). His counsel sought to obtain another hearing so that he could prepare a defense and could produce witnesses and documents in support of the claim of privilege, although he did not explain what he hoped to prove by them. He

again asked for transcripts of the grand jury testimony (A. A. 20–21, 26, 30–31). The court ruled that since the contempt was committed in its presence a hearing was not necessary, but he did permit petitioner's counsel another opportunity to support the claim of privilege (A. A. 30–31). Petitioner's counsel stated (A. A. 32–33):

> I say that this investigation might lead to a conspiracy indictment; that the questions that are being asked might, in some way, be connected with or be part of or used for the conspiracy indictment. Having that in mind, in good faith, even though it might be an erroneous assumption of privilege, it is not contempt because certainly with the avenue of investigation today, we have to examine the atmosphere that we are living in, not only the jurisdiction of the federal but also the jurisdiction of the state, and there is certainly sufficient ground to believe that conspiracy might lie from the line of questions that are being asked. If that is in the witness's mind, as I know it is in the witness's mind, I say that he is properly exercising his constitutional guarantee under the Fifth Amendment not to answer these questions on the ground that the answers might incriminate him.

When the court said it did not see how these answers could incriminate petitioner in a conspiracy, petitioner's counsel offered to explain in the absence of the grand jury, but in the presence of the Assistant United States Attorney (A. A. 35). The court declined this suggestion and ruled petitioner in contempt (A. A. 35).

On appeal, petitioner submitted, as part of his appendix in the Court of Appeals, newspaper clippings relating to civil litigation over an election to the presidency of the Teamsters Joint Counsel between Martin T. Lacey and Johnny O'Rourke in which Lacey was charging that O'Rourke and his adherents were mixed up with gangsters and racketeers, describing a so-called drive against city rackets by federal and local prosecutors, and naming one Johnny DioGuardio, an ex-convict, as the head of seven local unions whose role in the teamster's union a grand jury was seeking to pin down (A. A. 51–60). Considering petitioner's claim in the setting of what these clippings revealed, the Court of Appeals could find nothing that justified petitioner's claim of the privilege against self-incrimination in answering questions pertaining to the books and records of the union of which he was admittedly an official (Pet. 36–37). The Court of Appeals also held that petitioner had a fair hearing prior to the judge's ruling on the claim of privilege and was entitled to no further hearing under Rule 42 (a), applicable when a contempt is committed in the actual presence of the court, as it was here (Pet. 32–35). No error was found in the denial of the transcript of petitioner's grand jury testimony on April 12. The court noted that petitioner, at the hearing on the claim of privilege, intimated nothing about his testimony before the grand jury having a bearing on his refusals to answer questions relating to the whereabouts of the books and records; and, further, that petitioner was in constant consultation with his attorney at the time the requested testimony was given

and, therefore, it was reasonable to suppose that his counsel could have directed the District Court's attention to any part of the testimony which might have supported the claim of privilege (Pet. 34–35).

ARGUMENT

The basic issue in this case is the legal question of whether the custodian of the books and records of an association, as to which he admittedly has no privilege, may refuse on the ground of his personal privilege to answer auxiliary questions as to the whereabouts of these books and records when he has failed to produce them pursuant to subpoena. The procedure adopted by the District Court, and the procedural issues raised by petitioner, fall into place when considered in relation to that basic question. We therefore discuss first the issue of privilege, and then the questions as to the validity of the procedure adopted by the District Court in this case.

1. It was established by the decision of this Court in *United States* v. *White*, 322 U. S. 694, 699, that the custodian of the books and records of an organization cannot refuse to produce them pursuant to subpoena even though the records might tend to incriminate the custodian personally. See also *Rogers* v. *United States*, 340 U. S. 367, 372. It follows, as a necessary corollary, that the person who would be the normal custodian of the organization's books cannot, on the basis of his personal claim of privilege, refuse to answer auxiliary questions with respect to the whereabouts of the books and records when he—the representative who should have them—has failed to produce them as directed by the subpoena. As noted by the

Court of Appeals (Pet. 35–36), the requirement to produce the books and records of an organization would be largely meaningless if the lawful custodian could hand them over to someone else and then refuse to answer all questions pertaining to their whereabouts, thus effectively crippling any investigation from the start. See *United States* v. *Field*, 193 F. 2d 92, 97, and 193 F. 2d 109, 111, certiorari denied, 342 U. S. 894, where the Second Circuit had previously held that the trustee of a bail fund was properly held in contempt for failure to produce records of the fund and to answer auxiliary questions relating to the location and production of such records. Cf. *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 233–234 (C. A. 2), certiorari denied, 279 U. S. 863.[3]

[3] *United States* v. *Patterson*, 219 F. 2d 659 (C. A. 2), cited by petitioner (Pet. 22), involved a failure to produce association records, not a refusal to answer questions as to their whereabouts, and was reversed because the government did not sustain its burden of proving that they were still in existence. Patterson had already served a criminal contempt sentence for failing to produce the receipt books of the organization for the Internal Revenue Service which wished to audit them. Upon release from prison he was again asked for them, and when he declined, the matter was referred to a grand jury for investigation of possible violation of the internal revenue laws relative to keeping books for tax purposes. The witness claimed his privilege and gave as his reason the fact that an answer as to the whereabouts of the books might create the impression that he had destroyed them. At the point cited by petitioner (Pet. 22), the Court of Appeals mentions the fact that the District Court upheld the privilege (219 F. 2d at 661, 662), but does not expressly approve its action. Moreover, in the present case, petitioner himself testified that he was not in possession of the records at the time of service of the subpoena (G. A. 32); there was therefore no possibility of his incriminating himself of having unlawfully destroyed the records after service of the subpoena.

For this reason, petitioner's argument (Pet. 22–25) that he had valid reason to believe that his answers to the question might involve him in racketeering charges is irrelevant. We may even assume *arguendo* that, if the books were petitioner's personal records, his claim of privilege might have been justified under the rule of *Hoffman* v. *United States*, 341 U. S. 479. But the questions on which the contempt citation rested related only to the union books as to which petitioner's personal privilege did not apply. The questions were not to petitioner as an individual, but to him in his representative capacity as the normal custodian of the union's books. The language of this Court's decision in *United States* v. *White*, 322 U. S. at p. 705 therefore applies to the questions as well as to the books:

> * * * The union and its officers acting in their official capacity lack the privilege at all times of insulating the union's books and records against reasonable demands of governmental authorities.

2. Since the only issue before the judge was petitioner's duty as a union officer to answer questions as to the whereabouts of the union books, the procedure followed by the District Court in this case was wholly adequate to assure petitioner of due process.

Petitioner strongly contends that he was denied adequate opportunity to be heard and to introduce evidence to demonstrate that the answers to questions put to him by the court at the behest of the grand jury would tend to incriminate him (Pet. 15–20). But, as we have shown above, petitioner's personal privilege was immaterial in relation to the questions,

put to him in his representative capacity, as to the location of the union's books. The legal issue of whether petitioner had the right to claim his personal privilege with respect to these union books had already been determined against him by the court on April 17, two days before the court itself asked the questions and then cited petitioner for refusal in its presence to obey its direction to answer. Five days before that ruling, on April 12, petitioner had been warned that his refusal to answer would constitute a contempt of court (G. A. 44), and his attorneys, who were present in the anteroom at the time, had ample time to marshal their arguments on what was a pure issue of law.

When petitioner refused, in the court's presence, to comply with its ruling that he was required to answer questions relating to the union's books, his summary conviction for contempt was entirely proper under Rule 42 (a). There were no controlling factual issues of any kind.[4] The fundamental issue involved, then or now, was petitioner's right to assert his personal privilege with relation to questions, put to him in his representative capacity as custodian, concerning the whereabouts of the union's books. Petitioner's deliberate refusal to answer these questions, as to which the court had ruled he had no privilege, was the means by which he could obtain a final judgment to raise that issue on appeal. But at the same time it was a deliberate refusal in the presence of the court to obey an order of the court, and therefore properly subject to immediate punishment under Rule 42 (a).

[4] Actually, the court did offer counsel another opportunity to justify his claim of privilege (see the Statement, *supra*, pp. 10–11).

The same procedure was followed in *Rogers* v *United States*, 340 U. S. 367, also involving a legal issue of the right to claim the privilege (in that case, the status of the right in the face of prior admissions).[5] See Brief for Petitioner, Nos. 20, 21, 22, O. T. 1950, pp. 54–58, and Brief for the United States, Nos. 20, 21, 22, O. T. 1950, pp. 51–53.[6]

3. In view of the nature of the issue which was before the District Court for determination, there was no necessity to furnish petitioner with a copy of the grand jury minutes. The fifteen questions which were brought before the court for a ruling all raised the one legal issue as to whether petitioner, as the union official normally charged with custody, was required to account for the whereabouts of union records. None of the other questions asked petitioner had or could have had any bearing on that legal issue.[7] Petitioner's argument here, as in all other phases, fails to note the distinction, which the gov-

[5] In *Carlson* v. *United States*, 209 F. 2d 209, 215 (C. A. 1), cited by petitioner as in conflict with the decision below (Pet. 19–20), there were factual issues as to the validity of the claim of privilege and the court held only that due process required a hearing before validity of the claim of privilege was determined. Here, the issue was one of law, and the court had held a hearing before determining that issue. In addition, petitioner's counsel had not made any proper offer of proof of any relevant fact.

[6] In the *Rogers* case, a petition for rehearing to this Court which complained of the Court's silence on the procedural due process issue (Petition for Rehearing, No. 20, O. T. 1950, pp. 6–10) was denied. 341 U. S. 912.

[7] In *United States* v. *Zwillman*, 108 F. 2d 802 (C. A. 2), the other questions asked had a real bearing on the issue of danger presented by the particular questions on which the contempt proceeding was based.

ernment and the District Court sharply drew, between petitioner's position as custodian of the union books and petitioner's personal position as an individual. Only his duty as custodian is here involved.

CONCLUSION

The decision of the court below is in accord with established law. It is respectfully submitted that this petition for a writ of certiorari should be denied.

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AUGUST 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 260

JOSEPH CURCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES RESPECTING POSSIBLE MOOTNESS

The Solicitor General respectfully calls to the Court's attention certain new facts which raise a possible question of mootness in this case, now awaiting argument on writ of certiorari to the United States Court of Appeals for the Second Circuit, 352 U. S. 820. Although, in our judgment, these new facts do not render the case moot, we think it appropriate to inform the Court of these developments and of our views as to their effect, if any, on the status of the case.

The pertinent facts, upon which petitioner's conviction for contempt by the United States District Court

for the Southern District of New York was based, are set forth in the Statement in our Brief in Opposition (Br. Opp. 4–13). They may be more briefly summarized as follows:

Petitioner, the Secretary-Treasurer of Local 269 of the International Brotherhod of Teamsters, was subpoenaed to appear before a grand jury investigating racketeering in the garment and trucking industries, and to produce the books and records of the union. He did not produce the books and records, stated that he did not have possession of them, and declined on the ground of self-incrimination to answer any questions pertaining to their whereabouts or as to who was their custodian. The District Court, after a hearing, ruled that the privilege did not attach to these questions and ordered him to answer. The petitioner refused to answer, even when the court itself put the questions to him, and the court held him in contempt (Br. Opp. 3–4). The District Court thereupon committed petitioner (R. 41–42) "to be held in close continement for a period of six months" with a proviso that he might "purge himself of said contempt by appearing before the United States Grand Jury and answering said questions as directed."

After the petition for certiorari in this case had been granted (on October 8, 1956), on or about November 8, 1956, the United States Attorney was informed that the books and records of the union had just been seen in the office of the union, in petitioner's custody as Secretary-Treasurer. Since the object of the original subpoena had been to obtain the books

for the then pending investigation, and not to question petitioner, the United States Attorney, on the basis of the information he had on that date, issued, on November 8, 1956, a new subpoena duces tecum to petitioner as an officer of the union, calling for production of the books. The subpoena, returnable the same day, was not complied with. Petitioner explained that to produce the records might "prejudice his case in the Supreme Court." He did not deny that the books and records were then in his custody.

The District Court issued an order requiring petitioner to show why he should not be held in contempt for his noncompliance with this second subpoena. On November 14, 1956, argument was heard by the District Court on the show cause order, during which counsel for petitioner sought to avoid compliance with the subpoena on the ground of the pendency of the instant case in this Court. Again, there was no denial of petitioner's custody at that time. The District Court indicated its agreement with the government's position that the books should be produced without qualification. Defense counsel finally agreed that petitioner would produce the books and records for the grand jury. After this had been done, the second application to hold petitioner in contempt was dismissed on the government's own motion on November 27, 1956.

Under these circumstances, there is a question as to whether the instant case has become moot. Although petitioner was ordered imprisoned for his contumacious refusal to answer questions concerning books and records of which he would be the normal

custodian, and although he did not thereafter purge himself as provided in the order by answering questions, the objective of the first subpoena, and of the questions directed to petitioner in connection therewith, has been accomplished since the books have now been produced. The government concedes that, with the books already in its hands, if questions were now to be put to petitioner concerning the whereabouts of the books his claim of privilege with respect thereto would be in a different posture than in the original proceeding now before the Court.

If this proceeding had been for civil contempt, instituted for the sole purpose of coercing the petitioner into future compliance with the demands of a subpoena, the cause would be moot. Coercive sanctions imposed in civil contempt proceedings are wholly remedial in nature, serve only the purposes of the complainant, and are not intended as a deterrent to offenses against the public. *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191; *Maggio* v. *Zeitz*, 333 U. S. 56, 67–68; *Penfield Co.* v. *S. E. C.*, 330 U. S. 585, 590; *Nye* v. *United States*, 313 U. S. 33, 42; *McCrone* v. *United States*, 307 U. S. 61, 64; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 442. And a civil contempt order has served its purpose when its objectives have been achieved either through belated compliance by the contemnor, the termination of the proceedings to which the civil contempt proceedings are ancillary, or some other fact which renders the order no longer purposeful. *United States* v. *United Mine Workers of America*, 330 U. S. 258, 295; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418,

451; *United States* v. *International Union, United Mine Workers of America,* 190 F. 2d 865, 874 (C. A. D. C.).

It is equally clear that, had the original order provided for no more than a fixed term of imprisonment for the completed acts of disobedience, it would have been wholly criminal in nature, and the proceedings in this court would not be affected by any change of circumstances occurring after the completed contempt. *Gompers* v. *Bucks Stove & Range Co., supra* (221 U. S. at p. 442); *Parker* v. *United States,* 153 F. 2d 66, 70–71 (C. A. 1). We do not think this result is altered by the fact that the order gave this petitioner opportunity to answer the refused questions and thus to exonerate himself from further liability to imprisonment. The controlling fact is that he was being punished for his willful refusal to answer, and that he did not elect to purge himself in the manner specified in the order. See *Grant* v. *United States,* 227 U. S. 74, 78.[1]

It may well be that the contempt order, although intended primarily as punishment, was also intended in some measure as a coercive sanction to impel future compliance. Cf. *United States* v. *United Mine Workers of America, supra* (330 U. S. at pp. 298–299); *Lopiparo* v. *United States,* 222 F. 2d 897 (C. A.

[1] For other cases in which criminal contempt sentences provided for a fixed term or until such time as the defendant might purge himself, see, *Field* v. *United States,* 193 F. 2d 86, 88; 193 F. 2d 92, 94; 193 F. 2d 109 (C. A. 2), certiorari denied, 342 U. S. 894; *Lopiparo* v. *United States,* 216 F. 2d 87, 91 (C. A. 8), certiorari denied, 348 U. S. 916; 222 F. 2d 897 (C. A. 8).

8). The contempt order might thus be said to sound both in criminal and civil contempt. It was, however, primarily punitive and "the criminal feature of the order is dominant and fixes its character for purposes of review". *Nye* v. *United States,* 313 U. S. 33, 42–43; *Union Tool Co.* v. *Wilson,* 259 U. S. 107, 110; *Grant* v. *United States, supra.* Since petitioner did not purge himself under the contempt order, the criminal feature of that order (*i. e.,* petitioner's liability to imprisonment) survives. See *Lopiparo* v. *United States,* 222 F. 2d 897 (C. A. 8), where Lopiparo was found in contempt for not obeying an order to deliver corporate records to the grand jury, and was sentenced to 18 months' imprisonment "or until the further order of this Court should he produce before the grand jury the aforesaid records before the expiration of said sentence, or the discharge of said grand jury". 222 F. 2d at p. 897. The Court of Appeals held that his sentence did not terminate with the discharge of the grand jury since he had not pro-

duced the records in accordance with the condition of the order. Similarly here, although petitioner may, in practical effect, have lost the power to purge himself of the contempt for refusal to answer questions, his completed act of disobedience remains subject to punishment. *United States* v. *United Mine Workers of America, supra* (330 U. S. at p. 294); *Gompers* v. *Bucks Stove & Range Co., supra* (221 U. S. at p. 451).[2]

Respectfully submitted.

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DECEMBER, 1956.

[2] On remand, the District Court may modify the sentence, if it is appropriate to do so. Rule 35, F. R. Crim. P.

U. S. GOVERNMENT PRINTING OFFICE: 1956

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 260

JOSEPH CURCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 104–111) is reported at 234 F. 2d 470.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1956 (R. 112). A petition for rehearing was denied on June 22, 1956 (R. 112–113). The petition for a writ of certiorari was filed on July 18, 1956, and was granted on October 8, 1956 (R. 113). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner, Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters, was sub-

poenaed to appear before a grand jury which was investigating racketeering in the garment and trucking industries, and to produce the books and records of the union. He did not produce the books and records, said he did not have possession of them, and declined on the ground of self-incrimination to answer any questions pertaining to their whereabouts. The District Court ruled, after a hearing in which petitioner attempted to justify his claim of privilege, that the privilege did not attach to these questions and ordered him to answer. The petitioner refused to answer, even when the court itself put the questions to him, and the court summarily cited him for contempt under the authority of 18 U. S. C. 401 (3) and the procedure of Rule 42 (a) of the Federal Rules of Criminal Procedure. The questions presented are:

1. Whether the District Court properly held that the privilege against self-incrimination did not attach to questions relating to the whereabouts of the books and records of the union of which petitioner was secretary-treasurer.

2. Whether, in these circumstances, petitioner was afforded an adequate hearing and an opportunity to justify his refusal to answer the questions asked him by the court.

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

United States Constitution, Amendment V, provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

18 U. S. C. 401 provides in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42, Federal Rules of Criminal Procedure, provides:

> (a) *Summary Disposition.*—A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) *Disposition Upon Notice and Hearing.*—A criminal contempt, except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or

criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

On April 19, 1956, in the United States District Court for the Southern District of New York, Judge Gregory F. Noonan cited petitioner for contempt of court, under the authority of 18 U. S. C. 401 (3) and in accordance with Rule 42 (a) of the Federal Rules of Criminal Procedure (*supra*, p. 3), for refusing to answer certain questions in the court's presence. Petitioner was ordered confined for six months, with the proviso that he could purge himself of the contempt by answering the questions he had been directed to answer (R. 41–42).

This contempt citation grew out of the following circumstances:

On April 10, 1956, in answer to a subpoena to appear before a grand jury in the Southern District of New York and testify to all he knew with regard to an alleged violation of the federal conspiracy statute, 18 U. S. C. 371 (R. 47), petitioner appeared but declined to answer certain questions until he had consulted his attorney (R. 61–66). He was excused and ordered to return on April 12, 1956, with the books and records of Local 269 of the International Brotherhood of Teamsters which had been demanded in the subpoena duces tecum (R. 48–50), already served on him in his official capacity as secretary-treasurer of the union (R. 66).

On April 12, 1956, petitioner appeared with three persons, two of them attorneys (R. 67, 96), who stayed in an anteroom while petitioner testified before the grand jury, and with whom petitioner consulted frequently, with the permission of the grand jury foreman.[1] Petitioner stated that he was the Secretary-Treasurer of Local 269 of the International Brotherhood of Teamsters (R. 68); that the union had books and records to his knowledge (R. 75); that he had

[1] Petitioner consulted his attorney when asked the following questions:

"In whose possession are those records?" (R. 67–68). After consultation, petitioner declined to answer on the ground that it might incriminate him (R. 68).

"You've been an officer of other labor unions?" (R. 68). After consultation, petitioner replied that he had (R. 69).

"In your experience as a labor union officer, would you say that it's usually the function of the secretary-treasurer of a local to maintain custody of the books and records of the local?" (R. 69–71). After consultation, petitioner declined to answer on the ground of incrimination (R. 71).

"Did you, of this other labor union, have custody of the books and records?" (R. 72–73). After consultation, petitioner claimed privilege (R. 72–73). After the foreman directed petitioner to answer this question, he again consulted his attorney for four minutes (R. 73–74) and then answered that he did (R. 74).

"Referring to Local 269 of the International Brotherhood of Teamsters, to your knowledge are there any books and records of this local?" (R. 74). After a consultation of four minutes, petitioner replied that there were (R. 75).

"To your knowledge where were the records of Local 269 a week ago today?" (R. 79). After consultation for five minutes, petitioner claimed the privilege (R. 79).

"Mr. Curcio, do you know a James Hoffa who is Vice-President of the International Brotherhood of Teamsters?" (R. 89). After consultation, petitioner claimed the privilege (R. 89).

"What printer did you order those letterheads from?" (R. 92). After consultation, for over five minutes, petitioner answered the question (R. 92).

seen them (R. 84–85); but that they were not in his possession (R. 76). He refused, on the ground of self-incrimination, to state what kind of books they were (R. 76–77); whether he ever had custody of the books (R. 77); where the records were at specific times (R. 79–80, 86–87); whether John DioGuardia had ordered him not to produce the books (R. 84); and who had possession of the records at that time (R. 87). He was warned that refusal to answer proper questions would constitute contempt (R. 87). He was then excused with instructions to return on April 17, 1956 (R. 96).

On April 17, 1956, petitioner, accompanied by his attorney (Mr. Arnold Cohen) who had also accompanied him on April 12 to the grand jury hearing, reappeared before the grand jury and declined, again on the ground of self-incrimination, to answer any of the following questions, which were a portion of the questions which had been asked at the April 12 hearing (R. 96–102).

> I am going to ask you some questions, including some that were put to you on Thursday which you declined to answer. Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records?
>
> * * * * *
>
> Mr. Curcio, have you ever had possession of the books and records of this local?
>
> * * * * *
>
> Did you have custody and control of these records last Thursday?
>
> * * * * *

Do you have possession of those records or any of them today?

* * * * *

Do you have custody and control of any of these records today?

* * * * *

Where are any of those records today, if you know?

* * * * *

Who has any of those records today, if you know?

* * * * *

Where were any of these records or all of these records a week ago Thursday?

* * * * *

Where were any or all of these records a week ago Saturday?

* * * * *

Where were any or all of these records a week ago yesterday, Monday?

* * * * *

Where were any or all of these records this past Thursday?

* * * * *

Where are any or all of these records today?

* * * * *

Who, if you know, had any or all of these records a week ago Saturday?

* * * * *

Who had any or all of these records a week ago yesterday?

* * * * *

Who has any or all of these records today?

* * * * *

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The grand jury recessed and reconvened later the same day before District Judge Noonan, at which time petitioner was asked the same questions he had previously refused to answer that morning, was directed by the foreman of the grand jury to answer them, and declined to do so on the ground of self-incrimination (R. 3–9). Petitioner's counsel asked for and was denied a transcript of the grand jury testimony (R. 4–5). The Assistant United States Attorney gave Judge Noonan the background of petitioner's refusal and Judge Noonan then asked petitioner's attorney, Mr. Cohen, how the answering of these questions posed on April 17 would incriminate petitioner (R. 10). Mr. Cohen gave the following explanation (R. 10–11):

> The witness, I have been informed, did at one time answer questions that he did not have possession of the books and records. That certainly takes care of the subpoena duces tecum which was served upon him. Any other question relating to "Did you ever have possession" or "Do you know who has possession" I feel that his privilege goes to these questions and answers, because the nature of the investigation before the Grand Jury, if we are to try to get our information from the press, is to investigate racketeering in trucking and food local unions.
>
> In addition to that, we have here a civil action which is now being litigated, I think, on the 15th floor of this court.
>
> Insofar as the nature or purpose of any investigation by the Grand Jury relating to those questions, the defendant in many ways could

> be tied in, not being able to find out or determine or not being permitted to find out or determine the nature of the investigation in question, and he has the right, if in his mind he believes that the answer might incriminate him, to assert the Fifth Amendment to protect himself. I am telling the Court in good conscience that he is asserting the Fifth Amendment because in his mind there is some doubt as to whether or not any of these answers might incriminate him by conspiracy, by association, or by any other subsequent action that the United States Attorney's office might start.

After the court stated that the showing was insufficient to support the claim of privilege (R. 13), Mr. Cohen explained further (R. 14):

> I believe that to some extent the investigation, as far as I have been informed by my client, by the jury, is going into the internal affairs of a labor organization. I believe if there is any suspicion, proof or reason to believe that any labor organization or any official of any labor organization has committed any crime, they should be vigorously prosecuted. But I also feel that the United States Attorney's office should not be used to go into the internal affairs of a labor organization and to ask questions that are not material or relevant to the purposes of convenience of this noble and honorable Grand Jury for the purpose of possibly establishing something which is the subject of litigation in another part of this building.

The court then informed petitioner that his claim of privilege was improperly exercised and directed him to return to the grand jury room and answer

the questions just put to him before the court (R. 15). Neither petitioner nor his counsel asked for additional time to produce witnesses or documents in support of the claim of privilege.

Two days later, on April 19, 1956, petitioner appeared before the grand jury and declined to answer the questions he had been directed to answer by the court on April 17 (R. 18–19). He was then brought before Judge Noonan again, and, in the presence of the grand jury, Judge Noonan asked him the same questions he had previously been directed to answer. Petitioner declined to answer on the ground of self-incrimination (R. 26–28). His counsel sought to obtain another hearing so that he could prepare a defense and could produce witnesses and documents in support of the claim of privilege, although he did not explain what he hoped to prove. He again asked for transcripts of the grand jury testimony (R. 20–21, 26, 30–31). The court ruled that since the contempt was committed in its presence a hearing was not necessary; but he did permit petitioner's counsel another opportunity to support the claim of privilege (R. 31). Petitioner's counsel stated (R. 32–33):

> I say that this investigation might lead to a conspiracy indictment; that the questions that are being asked might, in some way, be connected with or be part of or used for the conspiracy indictment. Having that in mind, in good faith, even though it might be an erroneous assumption of privilege, it is not contempt because certainly with the avenue of investigation today, we have to examine the atmosphere that we are living in, not only the jurisdiction

> of the federal but also the jurisdiction of the state, and there is certainly sufficient ground to believe that conspiracy might lie from the line of questions that are being asked. If that is in the witness's mind, as I know it is in the witness's mind, I say that he is properly exercising his constitutional guarantee under the Fifth Amendment not to answer these questions on the ground that the answers might incriminate him.

When the court said it did not see how these answers could incriminate petitioner in a conspiracy, petitioner's counsel offered to explain in the absence of the grand jury, but in the presence of the Assistant United States Attorney (R. 35). The court declined this suggestion and ruled petitioner in contempt (R. 35).

On appeal, petitioner submitted, as part of the appendix to his brief in the Court of Appeals, newspaper clippings relating to civil litigation, over an election to the presidency of the Teamsters Joint Counsel, between Martin T. Lacey and Johnny O'Rourke in which Lacey was charging that O'Rourke and his adherents were connected with gangsters and racketeers; describing a so-called drive against city rackets by federal and local prosecutors; and naming one Johnny DioGuardia, an ex-convict, as the head of seven local unions whose role in the teamster's union a grand jury was seeking to discover (R. 51–60). Considering petitioner's claim in the setting of what these clippings revealed, the Court of Appeals could find nothing that justified his assertion of the privilege against self-incrimination in answering

questions pertaining to the books and records of the union of which he was admittedly an official (R. 107, 110–111). The Court of Appeals also held that petitioner had a fair hearing prior to the judge's ruling on the claim of privilege and was entitled to no further hearing under Rule 42 (a), which is applicable when a contempt is committed in the actual presence of the court as it was here (R. 108–110). No error was found in the denial of the transcript of petitioner's grand jury testimony on April 12. The court noted that petitioner, at the hearing on the claim of privilege, intimated nothing about his testimony before the grand jury having a bearing on his refusals to answer questions relating to the whereabouts of the books and records; and, further, that petitioner was in constant consultation with his attorney at the time the requested testimony was given and, therefore, it was reasonable to suppose that his counsel could have directed the District Court's attention to any part of the testimony which might have supported the claim of privilege (R. 109–110).

SUMMARY OF ARGUMENT

I

The basic issue which was before the District Court and is now here is a legal one—whether the custodian of the records of a union may refuse, on the ground of his personal privilege against self-incrimination, to answer questions as to the whereabouts of the association's books which have not been produced pursuant to subpoena. We make no claim that, if petitioner's personal privilege did apply to questions concerning

the union records, he failed to make an adequate showing of possible incrimination.

A. On the fundamental issue, it is the government's position that, since it is established that the custodian of an association's books may not refuse to produce them even if they would incriminate him personally (*United States* v. *White*, 322 U. S. 694, 699), the custodian's personal privilege also does not attach to his duty as custodian to explain the nonproduction of the books. The duty to account for books which have not been produced by the organization is not personal to the custodian, but arises by virtue of his office. Since petitioner, as custodian, was obliged to produce the books, regardless of their incriminatory character, he must also, as custodian, explain their nonproduction even if such explanation would incriminate him.

This Court has recognized that the power of governmental inquiry into organizational activities is dependent on a correlative power to compel the cooperation of its officers. See *United States* v. *Fleischman*, 339 U. S. 349, holding that each member of a joint board was bound to act with others to bring about compliance with an order. Similarly here, the right of the government to compel production demands the correlative power to require explanation of nonproduction. The power to compel production of nonprivileged records would be largely illusory if the custodian of unprivileged organization records could escape his responsibility by the simple expedient of passing the records from one person to another without explanation. The public character of the records would become more theoretical than real.

It is of course never possible wholly to separate an entity from the individual who acts for the entity. The problem is basically which aspect of the dual function of the custodian will be given more weight, the individual or the representative. Since, as to organization books, this Court has held the representative capacity to be controlling, that factor must govern as to questions relating to books which should have but have not been produced by the organization. The possibility that disclosure of the whereabouts of the books would reveal an obstruction of justice—*e. g.*, by destruction of the books—does not serve to change the representative character of the custodian's duty to account for the books. A custodian who has no privilege with respect to the books ought not to be allowed to bring himself within the protection of the privilege by violating his plain duty to produce.

We may point out that the alternative to a holding that the privilege does not attach to questions concerning the whereabouts of organization books would be a proceeding for contempt for failure to produce in itself. In such a proceeding, the mere fact of nonproduction would, in the normal case like this one, establish a *prima facie* case of willful disobedience; it would be the custodian's burden to explain nonproduction. He could not shield himself behind the privilege as the reason for his refusal to explain and still expect to escape the consequences that would flow from such a failure to explain. But we suggest that such a proceeding is not a desirable alternative. The purpose of an investigatory body is to get the records, not to put people in jail. It would be more desirable,

as to unprivileged organization books, to lay stress on the representative duty of the custodian to account for the books, rather than on punishment for failure to produce.

B. The lower federal courts have regularly held that the personal privilege of the custodian does not attach to questions concerning an organization's books. *E. g., United States* v. *Field,* 193 F. 2d 92, 109 (C. A. 2), certiorari denied, 342 U. S. 894.

II

Since the basic question before the District Court was the legal issue of whether petitioner's personal privilege attached to questions concerning the location of the unproduced union books, the procedure followed in that court was wholly adequate to accord petitioner due process. The fifteen questions selected, all relating to the whereabouts of the books, raised only that one issue. No other questions put to petitioner before the grand jury could have had any bearing on that legal issue since the other questions did not relate to petitioner's duty in his representative, as distinguished from his personal, capacity. Hence, the production of the grand jury transcript could have no relevance on the narrow issue involved in this contempt proceeding. Similarly, we do not claim that petitioner made an inadequate showing of incrimination *if he had a personal privilege.* The issue was whether he had such a privilege; a more extended hearing on the possibility of incrimination could have no relevance to that problem.

On the narrow legal issue, petitioner had ample time to marshal whatever legal arguments he wished

to make. On April 12, he had been warned that his refusal to answer would constitute contempt. On April 17, the judge ruled that he could not claim the privilege with respect to questions concerning the books. The proceeding on April 19, when the court itself asked the questions and petitioner refused to answer, was merely the carrying out of the judge's previous ruling of law. The refusal to answer in the presence of the court, in defiance of the judge's ruling, was the means by which petitioner obtained a final judgment which enabled him to obtain review of that legal ruling. The same procedure was followed in *Rogers* v. *United States,* 340 U. S. 367, also involving a question of law, where this Court affirmed the conviction without discussing similar claims of inadequacies in the trial court procedure.

ARGUMENT

By concentrating on a mass of material which is not now pertinent to this proceeding, petitioner's brief obscures the controlling question. The basic issue before the District Court and now before this Court is a general legal one—whether the custodian of a union's records may refuse, on the ground of his personal privilege against self-incrimination, to answer questions as to the whereabouts of the union's books which he has not produced pursuant to subpoena. The fact that out of several hundred questions put to petitioner only fifteen, all relating to the whereabouts of the books, were made the subject of the contempt proceeding sharply defines the limits of the issue now involved; there is no issue whatever as

to any of the other questions asked petitioner. Nor do we claim that, if petitioner's personal privilege does apply to the questions concerning the union's records, he failed to make an adequate showing of possible incrimination. Our position simply is that the privilege does not apply at all in these circumstances.

For this reason, petitioner's brief, which discusses for the most part the possibility of incrimination and the opportunity to make a showing of incrimination, deals with matters which we deem irrelevant. As we view it, the decisive question in the case is whether petitioner had a privilege as to the fifteen questions concerning the whereabouts of the union's records which had not been produced. Our argument is that petitioner had no privilege with respect to such questions because he had no privilege with respect to the books themselves, however incriminating—that the duty to account for nonproduction of the books was as much a representative duty, to which the privilege does not apply, as the duty to produce the books pursuant to subpoena. That is the issue we discuss first. And we then show that as to that issue, which was the basic one before the District Court, petitioner had ample notice and opportunity to present any argument that he wished to make in defense of his refusal to answer.[2]

[2] In December 1956, the Government filed a Memorandum for the United States Respecting Possible Mootness, concerned with events subsequent to the granting of certiorari. We do not repeat the material contained in that Memorandum, but refer to it for the considerations affecting possible mootness.

I. The official custodian of a union's books and records cannot refuse, under a personal claim of privilege against self-incrimination, to answer questions as to their whereabouts.

A. The duty to account for union books which have not been produced is, like the duty to produce, that of the custodian in his representative capacity to which his personal privilege does not attach.

1. It was established by the decision of this Court in *United States* v. *White*, 322 U. S. 694, 699, that the custodian of the books and records of an unincorporated association, such as a labor union, cannot refuse to produce them pursuant to subpoena even though the records might tend to incriminate the custodian personally. *White* thus applied to the books and records of labor unions and other unincorporated organizations the principle long applied to the books and records of corporations which cannot be insulated from reasonable demands of governmental authorities by a claim of personal privilege on the part of their custodian. *Rogers* v. *United States*, 340 U. S. 367, 372; *United States* v. *Fleischman*, 339 U. S. 349, 358; *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 205; *Essgee Co.* v. *United States*, 262 U. S. 151; *Grant* v. *United States*, 227 U. S. 74; *Wilson* v. *United States*, 221 U. S. 361. The Court in the *White* case explained the principle as follows (322 U. S. at pp. 699–700):

> * * * But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or associa-

> tion of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally. * * * Such records and papers are not the private records of the individual members or officers of the organization. Usually, if not always, they are open to inspection by the members and this right may be enforced on appropriate occasions by available legal procedures. See *Guthrie* v. *Harkness,* 199 U. S. 148, 153. They therefore embody no element of personal privacy and carry with them no claim of personal privilege.
>
> * * * * *

2. It follows, we believe, that the person who would be the normal custodian of the organization's books cannot, on the basis of his personal claim of privilege, refuse to answer auxiliary questions with respect to the whereabouts of the books and records when he, as the representative who should have them, has failed to produce them as directed by the subpoena.

The organization which does not produce the records called for in a subpoena is under an affirmative duty to explain what happened to them. *United States* v. *Bryan,* 339 U. S. 323, 331; *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541, 553; *United States* v. *Goldstein,* 105 F. 2d 150 (C. A. 2); *London Guarantee*

& Accident Co., Ltd. v. *Doyle & Doak,* 134 Fed. 125, 128 (C. C. E. D. Pa.). And the Court has recognized that the power of governmental inquiry into organizational activities is dependent on a correlative power to compel the cooperation of its officers. In *United States* v. *Fleischman,* 339 U. S. 349, for instance, each of the officers of the Joint Anti-Fascist Refugee Committee disclaimed individual power to produce the organization's records since their disposition required common action by members of the executive board acting together. Applying the principle of *Wilson* v. *United States,* 221 U. S. 361, that "a command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs," *Fleischman* held that each officer, having accepted "an office of joint responsibility," necessarily assumed "an individual responsibility to act, within the limits of his power to do so, to bring about compliance with the order." 339 U. S. at pp. 356–357.[3]

Similarly, the obligation of the custodian to explain the nonproduction of the union's books is not personal to him but arises by virtue of his representative status as official custodian of the organization records and "is incident to the requirement to produce."

[3] See also *Wheeler* v. *United States,* 226 U. S. 478, and *Grant* v. *United States,* 227 U. S. 74, in which this Court refused to extend the privilege against self-incrimination on the plea of individuals who had claimed ownership of the books and records of a dissolved corporation, on the basis that such transfer had neither altered the character of the documents as quasi-public records nor the obligation of their custodian to produce them on reasonable demand.

Wilson v. *United States*, 221 U. S. 361, 374.[4] 'Since organizations can act only through individuals, the individual is of course the one before the court. But since the duty to explain is that of the organization, the personal privilege of the individual cannot be used as an excuse for nonperformance of the organization's duty. Both the duty to produce and the duty to explain the nonproduction fall within the rationale of the Court's opinion in *White* (322 U. S. at pp. 704–705):

> * * * Nor could respondent claim the privilege on behalf of himself as an officer of the union or as an individual. The documents he sought to place under the protective shield of the privilege were official union documents held by him in his capacity as a representative of the union. No valid claim was made that any part of them constituted his own private papers. He thus could not object that the union's books and records might incriminate him as an officer or as an individual. * * * The union and its officers acting in their official capacity lack the privilege at all times of insulating the union's books and records against reasonable demands of governmental authorities.

The same public responsibility which compels the custodian to produce the records also demands that he explain their whereabouts when they are not in his

[4] It is only when the questioning goes beyond a reasonable inquiry as to the whereabouts or identity of such unprivileged documents that the representative's personal privilege may be invoked. *United States* v. *Gordon*, 236 F. 2d 916 (C. A. 2); *United States* v. *Daisart Sportswear*, 169 F. 2d 856, 861–862 (C. A. 2), certiorari denied, 335 U. S. 884; and see *Grant* v. *United States*, 227 U. S. 74. See also fn. 10, *infra*, p. 29.

physical possession at the time of demand. The custodian "has voluntarily assumed a duty which overrides his claim of privilege * * *." See *Shapiro* v. *United States,* 335 U. S. 1, 17.

Whether answers as to the whereabouts of the books would or would not implicate petitioner in the possible criminal activities of his union (Pet. Br. 37–43) has no more relevance to his duty as custodian to account for nonproduction than it had to the duty to produce involved in *United States* v. *White, supra.* There, as we have shown, the Court held that the personal privilege of the custodian does not justify the nonproduction of union books even though they are incriminating as to him. Obviously, if the books and records of a union contain information which tends to incriminate the custodian, answers to questions relating to the whereabouts of these documents may also tend to incriminate since they will lead to production of the evidence needed to support a prosecution against him. But since the personal privilege of the official custodian does not entitle him to insulate them from production, it cannot insulate them from disclosure of their location. Even where the very fact of custody, such as by an officer of the Communist Party, would carry the possibility of incrimination, this Court noted in *Rogers* v. *United States,* 340 U. S. 367, 372, that the personal claim of privilege "cannot be asserted in relation to the books and records sought by the grand jury * * *." See also fn. 11, *infra,* p. 30. And if the privilege does not attach to the books, no matter how incriminating the fact of possession, it should not attach to questions concerning the loca-

tion of the books which are held, not as an individual, but as the representative of an organization.

It is of course never possible wholly to separate an entity from the individual who acts for it. Union books can and sometimes do incriminate the man who must produce them; the custodian of books of such an organization as that of the Communist Party is implicated to some degree by the mere fact of custody. This Court was well aware of that fact in the *Wilson, White* and *Rogers* line of decisions, *supra*, p. 18. The question is basically which aspect of the dual function of the custodian will be given more weight, the individual or the representative. The Court has settled that, as to the books of unions, associations, and corporations, the representative capacity is controlling. That factor must also govern as to questions relating to the whereabouts of books which are not produced by the normal custodian.[5]

3. To hold that the personal privilege can be invoked in these circumstances would be, as observed in *Fleischman* (339 U. S. at 357), to "remove such organizations beyond the reach of legislative and judicial commands." Such a rule would mean that the custodian could conceal in his role as a private

[5] Petitioner is thus clearly in error in suggesting (Pet. Br. 40–42) that the fifteen questions relating to the whereabouts of the union books and records cannot be treated as separate from the other questions put to him. Rather, the selection of those fifteen questions shows that the government was carefully distinguishing between petitioner's privilege as an individual and petitioner's lack of privilege as custodian of the union records. The whole basis of the contempt proceeding is the position that the privilege does not attach either to the records or to questions as to the whereabouts of the records.

citizen what he is bound to disclose as an officer, and would permit him to exchange his role as an officer for that of private citizen whenever the inquiry into the activities of his organization threatened to embarrass him. If, merely by passing the records on to another, the organization spokesman could discharge his further responsibility toward them, his duty to produce would be, as the court below said (R. 110), "no more than an empty and meaningless form of words." A subpoena would be "an invitation to a game of hare and hounds, in which the witness [in this case, the organization itself] must testify only if cornered at the end of the chase." *United States* v. *Bryan,* 339 U. S. 323, 331. The difficulties which would be engendered by such an extension of the privilege are illustrated by the facts of this very case where this petitioner, although secretary-treasurer of his union and therefore normal custodian of its records, at first disavowed possession of any of them and refused to answer questions as to their whereabouts, but later, after this case had reached this Court, was found to have them in his possession as a union officer. See the Memorandum for the United States Respecting Possible Mootness, pp. 2–3. Unprivileged records should not be rendered immune from governmental inquiry by the simple expedient of passing the records back and forth without any obligation of explanation. And if custodians of union books were privileged against questions of a grand jury seeking to discover the books' whereabouts, a similar rule would presumably be applicable where union members seek through civil process to compel

their officers to disclose records of official transactions which have been concealed from them. The public character of the books (see *United States* v. *White, supra* (322 U. S. at pp. 699–700); *Guthrie* v. *Harkness*, 199 U. S. 148, 153) could thus become more a theoretical concept than a reality.*

4. The special suggestion is made (Pet. Br. 42–43) that questions as to the whereabouts of the books should be subject to the personal claim of privilege because the custodian could be himself involved in the crime of obstruction of justice which might be the direct cause of the nonproduction. It is well to note, first, that this is a belated claim in this case. In the District Court, petitioner's position was that the questions seeking to locate the union's books and records tended to implicate him in a possible con-

* That was the actual result in the New York case of *Bradley* v. *O'Hare*, 2 App. Div. 2d 436, cited by petitioner (Pet. Br. 42). There, in a suit by an international union against officers of former local, charging misappropriation of the local's assets, the defendant was upheld in his refusal, on the basis of privilege, to answer questions as to whether he possessed the bank books and records of the local. The court held that, since the questions related to the very property which the defendant was accused of misappropriating, the mere admission of possession would in itself be incriminating and distinguished this Court's *White* decision on that ground. To the extent that the New York decision is based on the theory that the privilege may be asserted where mere admission of possession would be incriminating, it is contrary to the implications of *Rogers* v. *United States*, 340 U. S. 367, 371, in which this Court noted that an official of the Communist Party could claim no privilege to refuse to produce Party books (see the text, *supra*, at p. 22). The Court of Appeals of New York has held that a corporate officer who refuses to explain nonproduction must give a reasonable explanation or suffer the penalty for nonproduction. *Bleakley* v. *Schlesinger*, 294 N. Y. 312, 62 N. E. 2d 85.

spiracy since the grand jury was investigating (R. 11) "racketeering in trucking and food local unions," and that in any event the grand jury was not authorized (R. 14) "to go into the internal affairs of a labor organization * * *." Similarly, in the Court of Appeals the emphasis of petitioner's argument was on his possible implication in illegal union activity.[7] He did, however, argue for the first time in that court that the questions also called for answers which might develop that he was conspiring to conceal the books of the union and thereby to obstruct justice (Pet. 24). This ground for assertion of the privilege is therefore "pure afterthought" (*Rogers* v. *United States*, 340 U. S. 367, 371), which, not having been brought to the attention of the District Court, is not available

[7] In the Court of Appeals petitioner argued, as he does here, that the questions for which he was cited were rendered incriminatory by relation to other questions which he refused to answer but which were not the subject of his contempt citation. He also submitted, as part of his appendix, newspaper clippings relating to civil litigation over an election to the presidency of the Teamsters Joint Counsel between Martin J. Lacey and Johnny O'Rourke in which Lacey was charging that O'Rourke and his adherents were mixed up with gangsters and racketeers, describing a so-called drive against city rackets by federal and local prosecutors, and naming one Johnny DioGuardia, an ex-convict, as the head of seven local unions whose role in the teamster's union a grand jury was seeking to pin down (R. 51–60). See the Statement, *supra*, pp. 11–12. One of the questions which petitioner had refused to answer but which was not included in his contempt citation had been (R. 84) "[d]id John DioGuardia order you not to come down or, rather, order you not to produce the books and records of Local 269." It was apparently petitioner's theory below that this and related questions rendered the other questions seeking to locate the books and records, for which he was cited, incriminatory since the content of these documents might reveal that he was personally involved in the union's activities.

to petitioner now. *United States* v. *Bryan*, 339 U. S. 323, 332–333.[8]

In any event, the argument as to possible obstruction of justice is not in essence different from the claim that the contents of the books could incriminate petitioner in the illegal affairs of the union. The contention is equally an attempt to give a personal character to a duty which is not personal but representative. If petitioner were in control of the union records at the time the subpoena was served on him, he was obligated, under *United States* v. *White*, *supra*, to produce them, and could not be excused because of their contents. Since this duty imposed on him as official custodian of the records was unqualified by the privilege, he certainly cannot bring himself within the protection of the privilege by violating his representative duty through a breach of the law. There would be even less reason to extend the privilege to such cases than in the instances where the claim is merely that the contents of the records would incriminate the custodian. As we have pointed out (*supra*, pp. 23–25), such a ruling would, in practical effect, immunize the organization's books and records from production.

[8] Petitioner stated to the grand jury that the books were not in his possession when he was questioned (R. 76); that they had not been in his possession three days preceding service of the subpoena on him (R. 77); and that he could not remember when he had last seen them (R. 84–85). There was thus no reasonable probability of direct incrimination in destruction of records after service of the subpoena, although conceivably there might be issues as to removal of the records in anticipation of a demand for their production.

5. Finally, it is appropriate to discuss the alternative to a holding that the privilege does not attach to questions concerning the location of organization books which have not been produced. That alternative is a conviction, not for failure to answer questions as to the books' whereabouts, but simply for failure to produce them. That could have been the procedure in this case. A prima facie case of criminal contempt would have been established by proof that (a) a valid subpoena duces tecum had been served on petitioner requiring him to produce books and records within his control, and (b) he failed to do so. *United States* v. *Bryan,* 339 U. S. 323, 330; *Lopiparo* v. *United States,* 216 F. 2d 87, 91–92 (C. A. 8), certiorari denied, 348 U. S. 916. The government would have had the right to rely on the presumption that the official custodian of the union's books had control over them at the time the subpoena was served, and the burden would have been on petitioner to explain the fact of nonproduction. *Lopiparo* v. *United States,* 216 F. 2d 87 (C. A. 8), certiorari denied, 348 U. S. 916; *London Guarantee and Accident Co.* v. *Doyle & Doak,* 134 Fed. 125, 128 (C. C. E. D. Pa.). Petitioner could not have shielded himself behind the claim of privilege to refuse to explain the whereabouts of the books and still expect to escape the consequences that would flow from nonproduction coupled with the absence of explanation. *Lopiparo* v. *United States, supra;* see also *United States* v. *Patterson,* 219 F. 2d 659 (C. A. 2), where the district court denied the claim of privilege in proceedings for

contempt based on the failure to produce organization books pursuant to subpoena.[9]

We suggest that this is not a desirable substitute. The aim of an investigatory body, grand jury or other, is to get the books, not to put people in jail. It would be more in accord with the purpose of investigation to lay stress on the representative duty of the custodian to account for the books, rather than on punishment for his failure to produce. If a custodian who should normally have books does not produce them, he ought to be required to explain the nonproduction so that the grand jury may obtain them. It should not be necessary to put him in jail for nonproduction in order to force an explanation of the location of the records which as custodian it is his duty to have.[10]

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[9] In the *Patterson* case, the Court of Appeals held that, under the particular facts there shown, the government had failed to establish that the books were in existence at the time the subpoena was served. Patterson had already served a sentence for contempt for failing to produce books before the Internal Revenue Service. His prison term had interrupted his custody of the records. On these special facts, the Court of Appeals found that it could not be presumed that records known to exist in 1953 were still in existence and still in Patterson's control in October 1954.

[10] Once the books are produced or the nonproduction adequately explained, the official duty as a custodian does come to an end. Thereafter, questions to an individual may be subject to a claim of personal privilege. It is for that reason that the government, in its memorandum as to possible mootness in this case, agreed that now, with the books actually in the government's hands, the questions put to petitioner as to the whereabouts of the books would be in a different posture than they were at the time of the contempt proceeding. The questions as to what he had previously done with the books would now be personal as to him, since the books have been found and produced.

In short, recognizing as we must that the individual and the representative cannot be wholly separated, we submit that, as to unprivileged books which should be produced in a representative capacity, questions concerning the whereabouts of the books should be judged in relation to the representative duty. A custodian should be required to account for organization books which he has failed to produce.

B. The lower federal courts have held that the personal privilege of the custodian does not attach to questions concerning an organization's books.

Although the question has not been directly decided by this Court,[11] the lower federal courts have fairly consistently applied this Court's reasoning that organization books are not subject to a personal privilege to reach the conclusion that the personal privilege of the custodian does not attach to questions concerning the books.

The Courts of Appeals for the Second, Fourth, Sixth and Ninth Circuits have said generally that testimony auxiliary to the production of corporate books and records "is unprivileged as are the documents themselves." *United States* v. *Illinois Alcohol Co.*, 45 F. 2d 145, 149 (C. A. 2), certiorari denied, 282 U. S. 901; *Carolene Products Co.* v. *United States*, 140 F. 2d 61, 66–67 (C. A. 4), affirmed on other grounds,

[11] In *Rogers* v. *United States*, 340 U. S. 367, the Court upheld the contempt conviction of the treasurer of the Communist Party of Denver for refusal to answer questions as to the person to whom she had turned over Party books. See *supra*, p. 22. The decision was, however, based on the theory that the defendant had already waived her privilege by testifying as to her position in the Party. See also the discussion of *Heike* v. *United States*, 227 U. S. 131, *infra*, pp. 32–33.

323 U. S. 18; *Lumber Products Assn.* v. *United States*, 144 F. 2d 546, 553 (C. A. 9), reversed on other grounds, 330 U. S. 395; *Pulford* v. *United States*, 155 F. 2d 944, 947 (C. A. 6).

Judge Augustus Hand specifically held in *United States* v. *Lay Fish Co.*, 13 F. 2d 136 (S. D. N. Y.), that corporate officers were not entitled to statutory immunity from incriminating grand jury testimony as to the identity of corporate books and papers because such testimony was not subject to the personal privilege against self-incrimination (13 F. 2d at p. 137):

> * * * The corporations had to produce their books and papers in answer to subpoenas (Wilson v. United States, 221 U. S. 361, * * *), and the testimony amounted to no more than an identification of the books by a responsible officer. This was a step in obtaining the production of the books, was ex necessitate rei a matter of corporate record, accessible at least by subpoena to the government, and was no more a subject of personal immunity, because the disclosure might possibly injure the individual officers, than were the contents of the books, because they might have a like effect. Indeed, I can see little difference between testimony of the character given and a production of the books under a subpoena without it. * * *

Later, the Court of Appeals for the Second Circuit reached a similar conclusion in *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 233–234, *certiorari denied*, 279 U. S. 863, where the secretary-treasurer of a corporation who was charged with conspiracy to violate the National Prohibition Act, was called

to the stand and was compelled to identify the minutes of the corporation over his objection. In an opinion holding that such procedure was not improper, Judge Learned Hand said for the court (31 F. 2d at pp. 233-234):

> * * * That the production of the books and documents could be compelled, even if they contained entries incriminating the accused, is now well-settled law. * * * Though they be in their very possession, even their property, it makes no difference; it is the semipublic character of the documents themselves which removes their inviolability, the fact that they record corporate transactions. However, the availability of the documents does not necessarily determine that of the testimony by which they may be authenticated. Conceivably it might be possible to force their production, and yet their possessor be protected from proving by his oath that they were what they purport to be. In some cases, as, for example, when they are authenticated by the corporate seal, this might be unnecessary, but usually something of the sort must appear.
>
> While, therefore, we do not disguise the fact that there is here a possible, if tenuous, distinction, we think that the greater includes the less, and that, since the production can be forced, it may be made effective by compelling the producer to declare that the documents are genuine. In Heike v. U. S., 227 U. S. 131, * * * *it is true that the testimony* of the accused was *given upon a hearing in* a separate proceeding *inquiring into* a *different crime*, and the plea *in effect claimed immunity for any other crime*, in the proof of which the books produced might

become a necessary link. Nevertheless, it would seem that the testimony was privileged, since it did directly incriminate the witness, though in another matter, and that the immunity was necessary to avoid it. Unless that case is to be disposed of on the theory that no such immunity was claimed, it necessarily held that the privilege did not exist. *Hence it appears to us that the case determines that testimony auxiliary to the production is as unprivileged as are the documents themselves.* By accepting the office of custodian the holder not only exposes himself to producing the documents, but to making their use possible without requiring other proof than his own. * * * [Emphasis added.] [12]

Subsequent to these opinions, the Second Circuit in *United States* v. *Field,* 193 F. 2d 92, 97, and 193 F. 2d 109, 111, certiorari denied, 342 U. S. 894, held that the trustees of a bail fund were properly held in contempt, not only for failure to produce records of the fund pursuant to subpoena, but for refusing to answer questions relating to the location and produc-

[12] In *Heike*, the defendant claimed immunity in respect to the use of certain incriminating testimony he had previously given before a grand jury investigating the activities of corporations of which he was secretary. He had been subpoenaed to bring the corporation records to the grand jury, and then had been asked detailed questions as to their contents. In holding that Heike was not entitled to personal immunity in respect to such testimony because it was not otherwise subject to the privilege, the Court of Appeals for the Second Circuit said (192 Fed. 83, 89), "But all this was merely a recital of what was disclosed by the books and papers of the corporation * * *. * * * Heike's so-called 'testimony' as to these subjects was but the preparation of an index to what they disclosed."

tion of such records. The court ruled that the custodian had no privilege as to such questions because, like questions relating to the identity of organization records, they were auxiliary to the production of the unprivileged records themselves. 193 F. 2d 92, 97. Although Judge Frank dissented as to other aspects of the majority opinion, he concurred in affirmance on the basis that (193 F. 2d at p. 102) "the defendants had no constitutional privilege either with reference to producing the Bail Fund's records or as to oral testimony concerning matters 'auxiliary to the production' of those records."

Here, no less than in *Field*, petitioner was the normal custodian of the records, and the person to whom an investigatory body would ordinarily look for their production. *Wilson* v. *United States*, 221 U. S. 361, 385; *Lopiparo* v. *United States*, 216 F. 2d 87, 91 (C. A. 8), certiorari denied, 348 U. S. 916. He was therefore obligated either to produce them before the grand jury pursuant to the valid subpoena, or on default of their production to answer questions relating to their whereabouts. As we have shown, both duties were imposed on him, not in his personal but in his representative capacity, and therefore neither is subject to a personal claim of privilege.

II. Since the only issue before the District Court was the legal question of whether petitioner's personal privilege attached to questions concerning the whereabouts of the unproduced union books, the procedure followed was wholly adequate to accord him due process.

As stated at the outset, petitioner's contentions as to defects in procedure stem from a misunderstanding

of the government's position in relation to the fifteen questions concerning the whereabouts of the books, which are the only questions involved in this contempt proceeding. Those inquiries raised the one legal issue as to whether petitioner, as the union official normally charged with custody and the officer to whom investigatory bodies would normally look for production of its records, was required to account for their whereabouts. We do not deny in this Court that, if petitioner had a personal claim of privilege in regard to such questions, the possibility of incrimination existed under the rule of *Hoffman* v. *United States*, 341 U. S. 479. Hence, it was not necessary for petitioner to have the opportunity to make a more extended demonstration of possible incrimination. Neither a more extended hearing on the subject of possible incrimination, nor the production of the grand jury transcript, could have had any relevance to the legal issue before the court.

Petitioner had ample time to defend on that legal issue. He was not taken unaware by the court's ruling finding him in contempt on April 19, 1956, since the issue on which that finding was based had already been determined against him on April 17, two days before the court itself asked the questions and then cited petitioner for refusal in its presence to obey its direction to answer. Five days before that ruling, on April 12, petitioner had been warned that his refusal to answer would constitute a contempt of court, and his attorneys, who were present in the anteroom at the time, had adequate time to marshal their arguments on what was a pure issue of law.

The record shows that petitioner's counsel was given extensive opportunity on each occasion to demonstrate some theory justifying an extension of petitioner's personal privilege to the questions asked, but each time failed to do so. Therefore, when petitioner refused, in the court's presence, to comply with its ruling that he was required to answer questions relating to the union's books, his summary conviction for contempt was entirely proper under Rule 42 (a), F. R. Crim. P. (*supra*, p. 3). *Carlson* v. *United States*, 209 F. 2d 209, 216 (C. A. 1).

There was not in this case, as in *Carlson*, any factual issue as to the validity of the claim of privilege, but merely the legal issue as to whether the privilege applied at all. Also, unlike *United States* v. *Zwillman*, 108 F. 2d 802 (C. A. 2), the *other* questions put to petitioner before the grand jury could have had no bearing on any issue with respect to the fifteen questions involved in the contempt proceeding. Rather, as we have pointed out, the selection of only the fifteen questions bearing on the location of the books was an acceptance, in effect, of the validity of petitioner's personal claim of privilege as to the other questions put to him as an individual. There was a careful distinction between petitioner's rights as an individual and his duty as custodian of the union records.

Thus, it is plain that the court had before it a question of law as to which no more was necessary than the legal argument which was had. When petitioner refused to accept the court's ruling on that question, but chose rather to defy it, his deliberate refusal in the presence of the court to obey an order of the court

was subject to immediate punishment under Rule 42 (a). From this defiance, there resulted the final judgment of conviction which enabled petitioner to raise the issue of law on appeal. Had petitioner as custodian of union records merely refused to produce them on the ground of privilege as in *United States* v. *White*, 322 U. S. 694, it is clear that even the most graphic demonstration of incrimination would not have excused the nonproduction of the records. The same rule obtains in the instant case; the possibility of incrimination would not, in our view, alter his unqualified obligation as a union officer to answer the questions pertaining to the location of the union books.

The same procedure was followed in *Rogers* v. *United States*, 340 U. S. 367, where the issue turned on a question of law (whether the petitioner had a right to claim the privilege in the face of prior admissions) rather than on the resolution of facts as to whether the question was incriminating. See Brief for Petitioner, Nos. 20, 21, 22, O. T. 1950, pp. 54–58, and Brief for the United States, Nos. 20, 21, 22, O. T. 1950, pp. 51–53. The Court ruled that the privilege was not available to Rogers and sustained the conviction, thus in effect overruling the contentions of procedural unfairness. A petition for rehearing which complained of the Court's silence on the procedural issue of due process (Petition for Rehearing, No. 20, O. T. 1950, pp. 6–10) was denied.

We stress that we do not suggest any restrictions on the right of a witness, who is entitled to the privilege providing he can show the requisite danger

of incrimination, to make such a factual showing appropriate to the circumstances of his case; but that was not the issue in this proceeding. No factual issue was involved. The only issue was and is whether petitioner, as custodian, had a privilege with respect to questions concerning union books. That problem was fully presented below and is properly before this Court now. Neither the production of the grand jury transcript in the first instance, nor a more extensive or formal hearing into the possibility of incrimination, could have any bearing on that question which is the only one here for decision.

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted,

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